TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 151.

THE PROVIDENT INSTITUTION FOR SAVINGS IN THE TOWN OF BOSTON, PLAINTIFF IN ERROR,

vs.

EDNA MALONE, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

FILED FEBRUARY 11, 1910.

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DANA MALONE, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 23, 1910.

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a UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the Honorable the Judges of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston, within and for the County of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Dana Malone, Attorney General, Plaintiff and The Provident Institution for Savings in the Town of Boston, Defendant, in a petition for the payment of certain deposits to the Commonwealth of Massachusetts wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Provident Institution for Savings in the Town of Boston as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the twenty-fifth day of January, in the year of our Lord one thousand nine hundred and nine.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by
MARCUS P. KNOWLTON,
C. J. S. J. C.
Chief Justice Supreme Judicial Court.

b COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

And now, here, the Judges of the Supreme Judicial Court make return of this writ by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I Walter F. Frederick, Clerk of said Supreme Judicial Court, have hereto set my hand and the seal of said Court this eighth day of February, A. D. 1909.

[SEAL.] WALTER F. FREDERICK, *Clerk.*

c COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To all persons to whom these presents shall come, Greeting:

Know ye, That among the Records of our Supreme Judicial Court, sitting at Boston in said County of Suffolk for hearing all causes, matters and things cognizable by a Supreme Court of Probate, between the first day of January in the year of our Lord one thousand nine hundred and nine and the thirty first day of December in the same year, both inclusive, it is thus contained, the following being the entire record in the case:—

1 COMMONWEALTH OF MASSACHUSETTS,
Suffolk County:

Supreme Judicial Court. In Equity.

DANA MALONE, Attorney General,
v.
THE PROVIDENT INSTITUTION FOR SAVINGS IN THE TOWN OF BOSTON.

RECORD FROM PROBATE COURT.

Certificate of Register.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Registry of Probate.

I, Arthur W. Dolan, register of the probate court for said county of Suffolk, having by law the custody of the seal and all the records, books, documents, and papers of or appertaining to said court, hereby certify the papers hereto annexed to be true copies of papers appertaining to said court, and on file and of record in the office of said court, to wit, the petition of Dana Malone, attorney general for

the commonwealth, praying that certain sums of money which are on deposit in the Provident Institution for Savings at Boston in said county be paid to the treasurer and receiver general for said commonwealth, the order of notice thereon the answer of the respondent to said petition, the decree of the court on said petition, and the claim of appeal from said decree.

In witness whereof I have hereunto set my hand and the
2 seal of said court, this twenty-seventh day of July in the year of our Lord one thousand nine hundred and eight.

[SEAL.] ARTHUR W. DOLAN, *Register.*

Petition.

(St. 1907, c. 340.)

To the Honorable the Judges of the Probate Court in and for the County of Suffolk:

Respectfully represents Dana Malone, attorney general for the commonwealth, that certain sums of money are on deposit in the Provident Institution for Savings in the Town of Boston, located at Boston in said county, to the credit of the persons hereinafter named, in the amounts stated opposite the names of said persons respectively:

Name.	Residence.	Amount.
African Amer. Samaritan Society.	Boston	$318 03
Anderson, M. F., trustee	"	48 40
Antoine, George	"	947 56
Babcock, Mary A.	"	1,783 28
Bills, William	"	1,024 14
Bourke, David	"	106 89
Boyle, Patrick	"	3,312 26
Braynard, Mrs.	"	734 88
Brown, Lysander	"	888 97
Brown, Rebecca	"	2,152 99
Brown, William	"	1,981 42
Burke, Anne	Charlestown	1,904 49
Burns, John	Boston	1,879 90
Cames, John	"	1,965 07
Cardo (Cardoes), John	"	1,894 91
Cellen, Mary	Cambridgeport	698 00
Choate, Sussannah	Boston	274 48
Collins, Catherine	"	31 83
Connelly, Margaret	"	63 65
3		
Connor, Timothy	Boston	$63 65
Connors, Jane	"	3,397 89
Cook, George W. & L. N.	Dorchester	115 18
Corcoran, James	Boston	3,484 28
Cox, Ellen	"	784 35

Name.	Residence.	Amount.
Cummings (or Commins), William	Boston	1,401 61
Curtis, Evelina W	"	144 51
Daley, Catherine	"	295 84
Dalton, Margaret	"	4,284 57
Dana, George		178 81
Davis, William	"	1,304 45
Deardon, Aaron	"	194 02
Diazs, Manuel	"	301 64
Dickinson, Frank	"	46 29
Dopkins, Henry	"	425 77
Dunn, Thomas W	"	248 02
Eaton, Sarah F., trustee for Catherine Kelley	"	265 97
Edson, Mary	South Boston	196 44
Edwards, William, trustee for Thomas Stratton	Boston	69 31
Fagan, Sarah, trustee for John H. Adams	"	152 39
Farewell, Sarah T	"	508 57
Farrell, Annie G	"	87 43
Fee, Margaret	East Cambridge	2,207 05
Fitch, Rebecca	Boston	535 74
Flaherty, Dennis	"	50 39
Flanagan, William	"	3,012 85
Foley, Catherine	"	4,232 75
Foley, John, Jr	"	4,225 46
Foley, Mary	"	4,235 42
Goff, Ann	"	162 70
Goodale, Alice, trustee for Eliza Osgood	"	256 61
Gorman, Daniel	"	3,780 44
Gove, Sarah	"	39 55
Gustus, Andrew	"	1,628 36
Hagerty, Johanna	"	318 04
Harrington, Maria L	"	133 70
Hasey, John	"	3,977 32
Hastings, Hannah M., trustee for George A. Hastings	"	359 41
Hayes, Patrick	"	128 11
Haynes, Hannah	"	255 61
Hennessey, Delia	"	61 46
Herrin, Mary E	"	207 12
Hewes, Samuel	"	858 56
Higgins, Julia A	"	1,247 15
Higgins, Margaret, trustee	South Boston	719 03
Hubbard, Samuel, trustee for Margaret Mitchell	Boston	317 78
Hubbard, Samuel, trustee for James McDavitt	"	222 12

4 Name.	Residence.	Amount.
Humphrey, William W.	Boston	$92 59
Hurley, Mary	"	28 09
Jansen, Louis	"	273 88
Joze, Dimos	"	3,611 01
Joze, Francisco	"	1,615 00
Keeley, James	"	2,867 22
Keeley, James	East Boston	1,292 19
Kelley, Julia	Boston	246 30
King, Charles	"	2,155 63
Kleeman, Thies	"	344 31
Knight, Mary P.	"	1,058 53
Lawson, John	"	52 37
Lawton, Isaac	"	217 59
Lee, William	"	2,011 56
Lloyd, James	"	45 76
Loring, Abby M., trustee for Margaret Morris	"	485 16
Lowell, Charles, trustee for Ann Lake, Louisa and Mary Castera.	"	277 98
Lury, Thomas	South Boston	169 93
McCann, Eliza	Boston	140 73
McCarthy, Bridget	"	48 07
McCarthy, Edward	"	224 03
McCarthy, Bridget	"	57 12
McDonald, Angus	"	458 36
McDonald, Patrick	"	2,049 71
McGrath, Bridget	"	84 85
McKay, Ann E.	"	130 85
McKenna, Thomas	"	2,138 41
McShane, Maggie	"	35 31
Madden, Catherine	"	1,063 16
Manning, Thomas	"	27 17
Mauworing, Leonard	"	2,496 87
Mason, Daniel	"	265 89
Mayo, Reuben H., trustee for David C. Cobb	East Boston	90 15
Miller, John	Boston	588 93
Moeller, Adam	"	80 88
Morton, Catherine C.	"	3,475 24
Motley, Ann E.	"	2,202 00
Mott, William, trustee for John Brown	"	1,444 44
Myers, Catherine	"	547 80
Nevel, Daniel	"	1,988 83
Nicholas, John	"	344 25
Norton, Patrick	"	1,147 86
Nugent, Mary	"	228 47
O'Brien, Catherine	Cambridgeport	167 35
O'Brien, Dennis	Boston	104 40
O'Brien, Ellen	"	365 06

5

Name.	Residence.	Amount.
O'Brien, Julia	Boston	161 98
O'Neil, Catherine	"	285 08
Otis, Mary (treasurer), trustee for Philena F. Ryan		55 09
Owens, John	"	455 59
Pealthrop, Hannah	"	186 67
Peterson, Cæsar	"	2,111 30
Peterson, Charles	"	1,875 96
Pine, John	"	159 79
Pinket, Samuel	"	1,594 42
Redwood, Susannah	"	160 49
Reiley, Catherine	Melrose	56 40
Reordan, Hanna	Boston	722 94
Ritchie, Jane T.	"	436 27
Roby, Ann	"	624 47
Romero, Leonard E.	"	61 68
Rooney, Mary	"	65 66
Ryan, Ann	"	1,060 66
Schuyler, Elizabeth	"	62 61
Searle, Mary	"	126 75
Smith, Peter R.	"	1,256 73
Spencer, Theresa		35 88
Square, Antio		1,256 83
Staples, Haskett	"	1,389 33
Sullivan, Catherine	"	28 51
Sullivan, Daniel	"	2,724 54
Van Gelder, Henry	"	399 31
Walker, William	"	330 79
Warren, William	"	2,260 57
Welch, Mary	"	2,095 38
Whalan (or Whelan), John	"	1,227 92
Wheelwright, Joseph H.	Chelsea	380 37
Williams, Catherine	Boston	3,617 45
Williams, Isabella	"	88 89
Williams, John	"	2,831 88
Williamson, John	"	4,090 30
Wood, Maria	"	692 64
Allette, Anna E.	"	24 00
Barrett, Thomas P.	"	1 00
Bean, Perkins	"	2 00
Bennett, Sarah C.	"	1 00
Bigelow, Timothy	"	3 00
Billings, Eliza A., trustee	"	1 00
Black, Charles E.	"	1 00
Bowen, Harvey, guardian William Dalton	"	19 66
Bradford, Mary E.	Cambridgeport	1 00
Brooks, John G.	Boston	1 00
Callaghan, Jeremiah J.	"	1 50

Name.	Residence.	Amount.
Campbell, Rosa	Boston	1 00
Chamberlain, Augustus F	"	1 00
Connors, Catherine	"	18 37
Crawley, Benjamin	"	1 00
6		
Curtis, Joseph H	Boston	2 00
Cushing, Tamson H	"	1 00
Daniels, Frank J., trustee for Eva M. Daniels	Dedham	4 64
Davis, Maria	Boston	1 00
Day, Harriet S	"	1 00
de Sandrans Victorine Co	"	2 18
Dubar, George F		1 00
Eaton, Susan, trustee for Waldo Eaton	Cambridge	16 85
Elwell, Mary L	Boston	1 55
Folsom, Catherine, trustee for Sarah Thayer	"	1 00
Fredericks, Harriet	"	3 74
Fuller, S. Eugene	Needham	1 00
Garland, *H*athaniel	Chelsea	1 00
Gay, Ware B	Boston	2 00
Goulding, Annie E	"	1 00
Griffin, Mary	"	1 00
Hamilton, Esther J	"	17 33
Heard, Richard	Chelsea	1 52
Hurley, James	Boston	2 00
Johnson, Olof, trustee for John A. Johnson, Jr.	Gloucester—East Cambridge	14 51
Kenney, Anna B	Chelsea	1 00
King, Charles	Boston	1 00
Logan, Mary S	Lynn	1 00
Lungburg, Hedwig	Boston	20 74
McCarthy, Julia	"	19 19
McCarthy, Ellen	"	1 00
McDermott, Thomas J	"	1 12
McDonald, Joseph H	"	2 00
McDonough, Mary, trustee for Ann McDonough	"	2 00
McIntire, Patrick	"	2 60
McLaughlin, Annie, trustee for Willie Carroll	"	2 00
McLaughlin, Catherine	"	1 75
McMahon, James, executor of Mary Donovan	"	16 68
Moore, John F	"	1 00
Morrison, Katie	"	2 00
Mulliken, Rebecca H	"	2 00
Murphy, Catherine	"	24 79
Philbrick, John C	"	1 34

Name.	Residence.	Amount.
Potter, Thomas	Boston	4 00
Putnam, Mary	"	2 00
Reichert, Elizabeth	East Cambridge	24 79
Ross, Jessie G	Boston	1 00
Ryan, Daniel F	"	2 15
Schultz, Adeline A	"	1 97
Scott, Isabella	"	50
Shelton, John J	"	2 00
Shepard, Adams	"	1 00

7

Smith, Benjamin	Brookline	3 15
Smith, Francis J	Boston	1 00
Smith, George A	Newton Centre	14 57
Smith, Maria	Boston	1 11
Stanton, Margaret	"	1 06
Stevenson, Frances G	"	1 00
Sullivan, Jennie T	"	1 40
Teesdale, John O., trustee for Fannie E. Teesdale	"	2 85
Thayer, William P	"	1 00
Tubbs, Frank H	"	1 08
Turner, Charles	"	1 00
Turner, Ruth	Brookline	1 00
Wallace, Frank, Jr	Shirley	2 00
Welch, Elizabeth T., trustee for John B. Read	Newton Centre	15 53
Welch, Elizabeth T., trustee for William Read	Newton Centre	15 53
Welch, Wilson H	West Newton	1 00

That for more than thirty years previous to the date of this petition no deposit has been made on any of the said accounts, that no part of the principal or interest of any of the said accounts has been withdrawn, and no interest has been added upon any of the pass books; but said deposits have remained during said period unclaimed.

That no claimant for any of said deposits is known, and that the depositors of said amounts cannot be found.

Wherefore your petitioner prays that this honorable court shall, in accordance with the provisions of St. 1907, c. 340, order and decree that said sums of money, with the increase and proceeds thereof, be paid to the treasurer and receiver general for said commonwealth.

DANA MALONE,
Attorney General.

8 *Citation.*

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Probate Court.

To African American Samaritan Society, Boston; M. F. Anderson, Trustee, Boston; George Antoine, Boston; Mary A. Babcock, Boston; William Bills, Boston; David Bourke, Boston; Patrick Boyle, Boston; Mrs. Braynard, Boston; Lysander Brown, Boston; Rebecca Brown, Boston; William Brown, Boston; Anne Burge, Charlestown; John Burns, Boston; James Cames, Boston; John Cardo (Cardoes), Boston; Mary Cellen, Cambridgeport; Susannah Chote, Boston; Catherine Collins, Boston; Margaret Connelly, Boston; Timothy Connor, Boston; Jane Connors, Boston; George W. & L. N. Cook, Dorchester; James Corcoran, Boston; Ellen Cox, Boston; William Cummings (or Commins), Boston; Evelina W. Curtis, Boston; Catherine Daley, Boston; Margaret Dalton, Boston; George Dana, Unknown; William Davis, Boston; Aaron Deardon, Boston; Manual Diazs, Boston; Frank Dickinson, Boston; Henry Dojkins, Boston; Thomas W. Dunn, Boston; Sarah F. Eaton, Trustee for Catherine Kelley, Boston; Mary Edson, South Boston; William Edwards, Trustee for Thomas Stratton, Boston; Sarah Fagan, Trustee for John H. Adams, Boston; Sarah T. Farewell, Boston; Annie G. Farrell, Boston; Margaret Fee, East Cambridge; Rebecca Fitch, Boston; Dennis Flaherty, Boston; William Flanagan, Boston; Catherine Foley, Boston; John Foley, Jr., Boston; Mary
9 Foley, Boston; Ann Goff, Boston; Alice Goodale, Trustee for Eliza Osgood, Boston; Daniel Gorman, Boston; Sarah Gove, Boston; Andrew Gustus, Boston; Johanna Hagerty, Boston; Maria L. Harrington, Boston; John Hasey, Unknown; Hannah M. Hastings, Trustee for George A. Hastings, Boston; Patrick Hayes, Boston; Hannah Haynes, Boston; Delia Hennessey, Boston; Mary E. Herrin, Boston; Samuel Hewes, Boston; Julia A. Higgins, Boston; Margaret Higgins, Trustee, South Boston; Samuel Hubbard, Trustee for Margaret Mitchell, Boston; Samuel Hubbard, Trustee for Jane McDavitt, Boston; William W. Humphrey, Boston; Mary Hurley, Boston; Louis Jansen, Boston; Dimos Joze, Boston; Francisco Joze, Boston; James Keeley, Boston; James Keeley, East Boston; Julia Kelley, Boston; Charles King, Boston; Thies Kleeman, Boston; Mary P. Knight, Boston; John Lawson, Boston; Isaac Lawton, Boston; William Lee, Boston; James Lloyd, Boston; Abby M. Loring, Trustee for Margaret Morris, Boston; Charles Lowell, Trustee for Ann Lake, Louis and Mary Castera, Unknown; Thomas Lury, South Boston; Eliza McCann, Boston; Bridget McCarthy, Boston; Edward McCarthy, Boston; Bridget McCarty, Boston; Agnus McDonald, Boston; Patrick McDonald, Boston; Bridget McGrath, Boston; Ann E.

McKay, Boston; Thomas McKenna, Boston; Maggie McShane, Boston; Catherine Madden, Boston; Thomas Manning, Boston; Leonard Mauworing, Boston; Daniel Mason, Boston; Reuben H. Mayo, Trustee for David C. Cobb, East Boston; John Miller, Boston; Adam Moeller, Boston; Catherine C. Morton, Boston; Ann E. Motley, Boston; William Mott, Trustee for John Brown, Boston; Catherine Myers, Boston; Daniel Nevel, Boston; John Nicholas, Boston; Patrick Norton, Boston; Mary Nugent, Boston; Catherine O'Brien, Cambridgeport; Dennie O'Brien, Boston; Ellen O'Brien, Boston; Julia O'Brien Boston; Catherine O'Neil, Unknown; Mary Otis (Treasurer), Trustee for Philena F. Ryan, Unknown; John Owens, Boston; Hannah Pealthrop, Boston; Cæsar Peterson, Boston; Charles Peterson, Boston; John Pine, Boston; Samuel Pinket, Boston; Susannah Redwood, Boston; Catherine Reiley, Melrose; Hanna Reordan, Boston; Jane T. Ritchie, Boston; Ann Roby, Boston; Leonard E. Romero, Boston; Mary Rooney, Boston; Ann Ryan, Boston; Elizabeth Schuyler, Boston; Mary Searle, Boston; Peter R. Smith, Boston; Theresa Spencer, Unknown; Antio Square, Boston; Haskett Staples, Boston; Catherine Sullivan, Boston; Daniel Sullivan, Boston; Henry Van Gelder, Boston; William Walker, Boston; William Warren, Boston; Mary Welch, Boston; John Whalan (or Whelan), Boston; Joseph H. Wheelwright, Chelsea; Catherine Williams, Boston; Isabella Williams, Boston; John Williams, Boston; John Williamson, Boston; Maria Wood, Boston; Anna E. Allette, Boston; Thomas P. Barrett, Boston; Perkins Bean, Boston; Sarah C. Bennett, Boston; Timothy Bigelow, Boston; Eliza A. Billings, Trustee, Boston; Charles E. Black, Boston; Harvey Bowen, Guardian William Dalton, Boston; Mary E. Bradford, Cambridgeport; John G. Brooks, Boston; Jeremiah J. Callaghan, Boston; Rosa Campbell, Boston; Augustus F. Chamberlain, Boston; Catherine Connors, Boston; Benjamin Crawley, Boston; Joseph H. Curtis, Boston; Tamson H. Cushing, Boston; Frank J. Daniels, Trustee for Eva M. Daniels, Dedham; Maria Davis, Boston; Harriet S. Day, Boston; Victorine C. de Sandrans, Boston; George F. Dunbar, Boston; Susan Eaton, Trustee for Waldo Eaton, Cambridge; Mary L. Elwell, Boston, Catherine Folsom, Trustee for Sarah Thayer, Boston; Harriet Fredericks, Boston; S. Eugene Fuller, Needham; Nathaniel Garland, Chelsea; Ware B. Gay, Boston; Annie E. Goulding, Boston; Mary Griffin, Boston; Esther J. Hamilton, Boston; Richard Heard, Chelsea; James Hurley, Boston; Olof Johnson, Trustee for John A. Johnson, Jr., Glouchester—East Cambridge; Anna B. Kenney, Chelsea; Charles King, Boston; Mary S. Logan, Lynn; Hedwig Lunburg, Boston; Julia McCarthy, Boston; Ellen McCarty, Boston; Thomas J. McDemott, Boston; Joseph H. McDonald, Boston; Mary McDonough, Trustee for Ann McDonough, Boston; Patrick McIntire, Boston; Annie McLaughlin, Trustee for Willie Carroll, Boston; Catherine McLaughlin, Boston; James McMahon, Executor of Mary Donovan, Unknown; John F. Moore, Boston; Katie Morrison, Boston; Rebecca H. Muliken, Boston; Catherine

Murphy, Boston; John C. Philbrick, Boston; Thomas Pot-
12 ter, Boston; Mary Putnam, Boston; Elizabeth Reichert, East Cambridge; Jessie G. Ross, Boston; Daniel F. Ryan, Boston; Adeline A. Schultz, Boston; Isabella Scott, Boston; John J. Shelton, Boston; Adams Shepard, Boston; Benjamin H. Smith, Brookline; Francis J. Smith, Boston; George A. Smith, Newton Centre; Maria Smith, Boston; Margaret Stanton, Boston; Frances G. Stevenson, Boston; Jennie T. Sullivan, Boston; John O. Teesdale, Trustee for Fannie E. Teesdale, Boston; William P. Thayer, Boston; Frank H. Tubbs, Boston; Charles Turner, Boston; Ruth Turner, Brookline; Frank Wallace, Jr., Shirley; Elizabeth T. Welch, Trustee for John B. Read, Newton Centre; Elizabeth T. Welch, Trustee for William Read, Newton Centre; Wilson H. Welch, West Newton; and to all other persons interested in certain sums of money deposited in the Provident Institution for Savings in the Town of Boston, located at Boston in said county, to the credits of the persons above named, in the amounts set forth in the hereinafter described petition:

Whereas, Dana Malone, attorney general for said commonwealth, has presented to said court his petition representing that for more than thirty years previous to the date of said petition no deposit has been made on any of the said accounts, nor has any part of the principal or interest of any of the said accounts been withdrawn, and no interest has been added upon any of the pass books; that said deposits have remained during said period unclaimed, nor is any claimant known, and that the depositors of said amounts cannot
13 be found; and praying that this court, in accordance with the provisions of chapter 340 of the acts of the year 1907, order and decree that said sums of money, with the increase and proceeds thereof, be paid to the treasurer and receiver general of said commonwealth:

You are hereby cited to appear at a probate court to be held at Boston in said county of Suffolk on the 16th day of July A. D. 1908, at 10 o'clock in the forenoon, to show cause, if any you have, why the same should not be granted. And said petitioner is ordered to serve this citation by delivering a copy thereof to the said Provident Institution for Savings in the Town of Boston, fourteen days at least before said court, and by publishing the same once in each week, for three successive weeks, in the "Boston Daily Advertiser" and "Boston Daily Globe," newspapers published in said Boston, the first publication to be sixty days at least before said court and the last publication to be twenty-one days at least before said court.

Witness, Robert Grant, Esq., first judge of said court, this fifth day of May in the year one thousand nine hundred and eight.

ARTHUR W. DOLAN, *Register.*

I have served the foregoing citation as therein ordered.

LOUIS H. FREESE

14 —— ——, *ss:*

JULY 9, A. D. 1908.

Personally appeared Louis H. Freese, and made oath to the truth of the above return, by him subscribed.

Before me,

CLARA L. POWER,
Special Commissioner.

Answer of the Respondent, The Provident Institution for Savings in the Town of Boston.

And now comes the respondent, the Provident Institution for Savings in the above-entitled cause, and for answer denies each and every allegation in the plaintiff's petition contained except so far as the same are hereinafter admitted.

It admits that it is a savings-bank corporation created by a statute of the commonwealth of Massachusetts, passed in the year eighteen hundred and sixteen, existing and doing business under a special charter created by said statute, a copy of which charter is hereunto annexed marked A.

It denies that it has standing upon its books to the credit of Harvey Brown, guardian William Dalton; G. W. and C. N. Cook; Sarah Fagan, trustee for John H. Adams; Julia A. Higgins, Margaret Higgins, Julia McCarthy, Catherine McLaughlin, Elizabeth Reichert, Mary Searle, Elizabeth T. Welch, trustee for John B. Read, or James Mehiggen, and sum or sums whatsoever.

It admits that it has standing upon its books to the credit of the persons mentioned in the plaintiff's petition, except only those persons hereinbefore mentioned, the sums stated in said petition,
15 and that for more than thirty years previous to the date of this petition no deposit has been made on any of said accounts, no part of the principal or interest of any of said accounts has been withdrawn, and no interest has been added upon any of the pass books, but that said deposits have remained during said period unclaimed.

And for a further answer this respondent says that at the time when each and every one of the persons whose names appear in said petition deposited money with it, it issued to each of said persons a pass book, and that each of said persons then and there subscribed to the by-laws of said Provident Institution for Savings, and agreed to be bound thereby, and that the same should be and constitute the contract between each of them and said institution. A copy of such of the said by-laws as are material is hereunto annexed marked B.

All of the above-mentioned by-laws were by-laws of said institution at the time when each of said depositors deposited money with it, and have ever since continued to be its by-laws.

And said respondent, further answering, says that chapter 340 of the Acts and Resolves of Massachusetts for the year 1907 is null and void as unconstitutional and in contravention of the Fourteenth Amendment of the Constitution of the United States, as depriving

persons of their property without due process of law, and also as in contravention of the constitution of this commonwealth; and also is null and void as unconstitutional and in contravention of the
16 Constitution of the United States, as impairing the obligation of contracts.

By WM. ROPES TRASK,
Its Attorney.

A.

COMMONWEALTH OF MASSACHUSETTS:

An Act to Incorporate the Provident Institution for Savings in the Town of Boston.

SECTION 1. Be it enacted by the Senate and House of Representatives, in General Court assembled and by the authority of the same, That his Honor William Phillips, John Phillips, Samuel Parkman, James Perkins Thomas Dawes, John Lowell, Russell Sturgis, Jonathan Hunnewell, Josiah Quincy, John D. Williams, James Prince, Thomas K. Jones, Richard Sullivan, Redford Webster, William Little, Samuel Snelling, Jesse Putnam, Esquires; Rev. Thomas Baldwin, D. D.; Rev. William E. Channing, Rev. Charles Lowell, William Mackay, Elisha Ticknor, Jonathan Amory, jun., Samuel H. Whalley, John L. Sullivan, John Bellows, Joseph Coolidge, jun., John Richards, Ozias Goodwin, John Dorr, Samuel May, Gedney King, William Ropes, Andrew Ritchie, Edward Tuckerman, jun., William Harris, David Greenough, Thomas Motley, Benjamin Smith, David W. Child, Gideon Snow, Edward Cruft, Jacob Hiler, Jonathan Phillips, William Cochran, Nathaniel G. Snelling, Lewis Tappan, and James Savage, be, and they hereby are, incorporated into a Society by the name, style, and title of "The Provident Institution for
17 Savings in the Town of Boston;" and that they, and such others as shall be duly elected members of the said Corporation, as is in this act provided, shall be and remain a body politic and corporate, by the same name, style, and title forever.

SECT. 2. Be it further enacted, That the said Society and Corporation shall be capable of receiving from any person or persons disposed to obtain and enjoy the advantages of said Institution any deposit or deposits of money, and to use and improve the same for the purposes, and according to the directions, herein mentioned and provided.

SECT. 3. Be it further enacted, That all deposits of money received by the said Society shall be by the said Society used and improved to the best advantage; and the income or profit thereof shall be by them applied and divided among the persons making the said deposits, their executors or administrators, in just proportion, with such reasonable deductions, and the principal of such deposits may be withdrawn at such times and in such manner, as the said Society shall direct and appoint.

SECT. 4. Be it further enacted, That the said Society and Corpora-

tion shall, at their Annual Meeting in December, have power to elect by ballot any other person or persons as members of the said Society.

SECT. 5. Be it further enacted, That the said Society may have a common seal, which they may change and renew at pleasure; and that all deeds, conveyances and grants, covenants and agree-
18 ments, made by their Treasurer or any other person, by their authority and direction according to their institution, shall be good and valid; and the same Corporation shall at all times have power to sue, and *amy* be sued, and may defend, and shall be held to answer, by the name, style, and title aforesaid.

SECT. 6. Be it further enacted, That the said Society shall hereafter meet at Boston, some time in the month of December annually, and as much ofterner as they may judge expedient; and any seven members of the said Corporation The President, a Vice-President, Treasurer, or Secretary being one—shall be a quorum; and the said Society, at their meetings in December annually, shall have power to elect and choose a President, Vice-Presidents, and all other such officers as to them shall appear necessary; which officers so chosen shall continue in office one year, and until others are chosen in their room; and all officers so chosen shall be under oath to the faithful performance of the duties of their offices respectively.

SECT. 7. Be it further enacted, That the said Society hereby are, and forever shall be, vested with the power of making By-Laws for the more orderly managing the business of the Corporation; provided the same are not repugnant to the Constitution or Laws of this Commonwealth.

SECT. 8. Be it further enacted, That his Honor William
19 Phillips, Esq., be, and he hereby is, aut-orized by public notification in two of the Boston newspapers, to call the first meeting of the said Society at such time and place as he shall judge proper.

In the House of Representatives, Dec. 11, 1816. This bill, having had three several readings, passed to be enacted.

TIMOTHY BIGELOW, *Speaker.*

In Senate, Dec. 13, 1816. This bill, having had two several readings, passed to be enacted.

JOHN PHILLIPS, *President.*

Dec. 13, 1816. Approved.

JOHN BROOKS.

(An Act was passed in March 1831, empowering the Institution to hold real estate in Boston to the amount of twenty thousand dollars.)

(An Act was passed in March, 1833, empowering the Provident Institution to purchase and hold real estate in the City of Boston to the amount of thirty thousand dollars.)

(An Act was passed February, 1854, authorizing the Institution to hold real estate to the amount of one hundred thousand dollars.)

B.

Extracts from Plan and By-Laws of the Provident Institution for Savings in the Town of Boston.

1. Object of the Institution.

To enable industrious persons of all descriptions to invest such parts of their earnings or property as they can conveniently spare, in a manner which will afford them both profit and security.

6. Smallest Deposit.

The smallest deposit shall be one dollar, and the lowest sum which will be put upon interest shall be five dollars, and no fractional part of a dollar shall be received.

10. Dividends.

On the third Wednesday of January and July in every year, there shall be declared a dividend of two per centum, or four per centum, per annum on all sums above five dollars, which shall have been deposited for the space of six months next preceding; and a proportionable rate of interest shall be paid on any sum which shall have been deposited for the space of three months. No dividend shall be computed upon fractional parts of a dollar.

11. Interest, When to Cease.

No interest shall be paid on any sums withdrawn for the period which may have elapsed since the last dividend, nor shall any interest be paid on sums which shall have been withdrawn before any dividend shall have been declared.

12. Extra Dividends to Those Who Permit Their Money to Remain in the Institution.

At the end of every five years, the first to be computed from the third Wednesday of July, 1817, there shall be declared a dividend of all the profits which may have accrued within the said five years (after deducting the dividends already made, the necessary expenses of the Institution, the sums necessary to keep good the capital stock) to and among all those depositors whose deposits exceed the sum of five dollars, and which shall have remained in said Institution for the space of one year, at least, next preceding the time of declaring said extra dividend, in proportion to the sums by them respectively deposited, and to the length of time during which the said deposits may have remained in said Institution; but, in making said apportionment or distribution, no regard shall be had to any fractional parts of a year, but each sum deposited

within any year shall be referred, for the purpose of calculating its share of the extra dividend, to the third Wednesday of July next following the time in which it was deposited.

13. Dividends Unclaimed to be Added to the Principal.

All dividends shall be added to the principal of the depositor, and shall be entitled to dividends as much as the original deposit; provided that such dividends, when added, do not make the principal exceed sixteen hundred dollars, which shall be the maximum amount upon which dividends are to be cast.

14. Mode of Withdrawing Funds and Receiving Interest.

Money deposited, and the dividends thereon, may be received either personally, by the order in writing of depositors, or by letter of attorney; but no persons shall receive any part of their principal or interest without producing the original book, that such payments may be entered thereon. No depositor shall be entitled to
22 receive any principal or interest without having given thrity days' prev-ous notice to the Treasurer; but the Treasurer may pay any depositor upon less notice, or without any, if it should happen to suit his convenience. All money received by the Treasurer shall be either in specie or bills of the Boston banks, or of such other banks as may be designated by the Board of Investment; and all payments made by him shall be made in the same manner.

15. Duplicate Book.

All deposits shall be entered in the books of the Corporation and a book shall be given to each depositor, in which every deposit made by him shall be entered. This shall be his voucher, and the evidence of his property in said Institution.

16. In Case of Death.

Upon the death of any depositor, the money standing in the name and to the credit of such depositor shall be paid to the legal representative, conformably to the laws of the State; provided, however, that if in such case the deposit and its accumulation amount to less than one hundred dollars, the Board of Investments may at its discretion, upon receiving adequate security, authorize the payment of such sum to the party equitably entitled without letters testamentary or of administration.

18. Signature of Rules.

On making the first deposit, the depositor shall be required to subscribe, and thereby signify his assent, to the Regulations and By-Laws of the Institution, and to all such alterations thereof
23 as may be duly made.

20. Institution, How Dissolved.

The Trustees may, by vote of a major part of the whole number, at any time divide the whole of the property among the depositors, in proportion to their respective interests therein, upon giving three months' notice thereof, and shall also be at liberty to refuse to receive any deposit at their pleasure.

23. The deposits of any person shall not at any time exceed the sum of sixteen hundred dollars, on which interest shall be allowed.

Decree.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

At a probate court holden at Boston, in and for said county of Suffolk, on the sixteenth day of July in the year of our Lord one thousand nine hundred and eight:

On the petition of Dana Malone, attorney general for the said commonwealth, praying that the court order that certain sums of money which are on deposit in the Provident Institution for Savings at Boston in said county, to the credit of the persons hereinafter named, and in the amounts stated opposite the names of said persons respectively, with the increase and proceeds thereof, be paid, in accordance with the provisions of St. 1907, c. 340, to the treasurer and receiver general for said commonwealth:

24

Name.	Residence.	Amount.
African Amer. Samaritan Society.	Boston	$318 03
Anderson, M. F., trustee	"	48 40
Antoine, George	"	947 56
Babcock, Mary A.	"	1,783 28
Bills, William	"	1,024 14
Bourke, David	"	106 89
Boyle, Patrick	"	3,312 26
Braynard, Mrs.	"	734 88
Brown, Lysander	"	888 97
Brown, Rebecca	"	2,152 99
Brown, William	"	1,981 42
Burke, Anne	Charlestown	1,904 49
Burns, John	Boston	1,879 90
Cames, John	"	1,965 07
Cardo (Cardoes), John	"	1,894 91
Cellen, Mary	Cambrigeport	698 00
Choate, Susannah	Boston	274 48
Collins, Catherine	"	31 83
Connelly, Margaret	"	63 65
Connor, Timothy	"	3,397 89
Connors, Jane	"	115 18
Cook, George W. & L. N.	Dorchester	154 27

Name.	Residence.	Amount.
Corcoran, James	Boston	3,484 28
Cox, Ellen	"	784 35
Cummings (or Commins), William	"	1,401 61
Curtis, Evelina W	"	144 51
Daley, Catherine	"	295 84
Dalton, Margaret	"	4,284 57
Dana, George	"	178 81
Davis, William	"	1,304 45
Deardon, Aaron	"	194 02
Diazs, Manuel	"	301 64
Dickinson, Frank	"	46 29
Dopkins, Henry	"	425 77
Dunn, Thomas W	"	248 02
Eaton, Sarah F., trustee for Catherine Kelley	"	265 97
Edson, Mary	South Boston	196 44
Edwards, William, trustee for Thomas Stratton	Boston	69 31
Fagan, Sarah, trustee for John H. Adams	"	152 39
Farewell, Sarah T	"	508 57
Farrell, Annie G	"	87 43
Fee, Margaret	East Cambridge	2,207 05
Fitch, Rebecca	Boston	535 74
Flaherty, Dennis	"	50 39
Flanagan, William	"	3,012 85
Foley, Catherine	"	4,232 75
Foley, John, Jr	"	4,225 46
Foley, Mary	"	4,235 42
Goff, Ann	"	162 70
25		
Goodale, Alice, trustee for Eliza Osgood	Boston	256 61
Gorman, Daniel	Boston	3,780 44
Gove, Sarah	"	39 55
Gustus, Andrew	"	1,628 36
Hagerty, Johanna	"	318 04
Harrington, Maria L	"	133 70
Hasey, John	"	3,977 32
Hastings, Hannah M., trustee for George A. Hastings	"	359 41
Hayes, Patrick	"	128 11
Hayes, Hannah	"	255 61
Hennessey, Delia	"	61 46
Herrin, Mary E	"	207 12
Hewes, Samuel	"	858 56
Higgins, Julia A	"	1,247 15
Higgins, Margaret, trustee	South Boston	719 03
Hubbard, Samuel, trustee for		

Name.	Residence.	Amount.
Margaret Mitchell	Boston	317 78
Hubbard, Samuel, trustee for James McDavitt	"	222 12
Humphrey, William W	"	92 59
Hurley, Mary	"	28 09
Jansen, Louis	"	273 88
Joze, Dimos	"	3,611 01
Joze, Francisco	"	1,615 00
Keeley, James	"	2,867 22
Keeley, James	East Boston	1,292 19
Kelley, Julia	Boston	246 30
King, Charles	"	2,155 63
Kleeman, Thies	"	344 31
Knight, Mary P	"	1,058 53
Lawson, John	"	52 37
Lawton, Isaac	"	217 59
Lee, William	"	2,011 56
Lloyd, James	"	45 76
Loring, Abby M., trustee for Margaret Morris	"	485 16
Lowell, Charles, trustee for Ann Lake, Louisa and Mary Castera		277 98
Lury, Thomas	South Boston	167 93
McCann, Eliza	Boston	140 73
McCarthy, Bridget	"	48 07
McCarthy, Edward	"	224 03
McCarty, Bridget	"	57 12
McDonald, Angus	"	458 36
McDonald, Patrick	"	2,049 71
McGrath, Bridget	"	84 85
McKay, Ann E	"	130 85
McKenna, Thomas	"	2,138 41
McShane, Maggie	"	35 31
Madden, Catherine	"	1,063 16
26		
Manning, Thomas	Boston	27 17
Mauworing, Leonard	"	2,496 87
Mason, Daniel	"	256 89
Mayo, Reuben H., trustee for David C. Cobb	East Boston	90 15
Miller, John	Boston	588 93
Moeller, Adam	"	80 88
Morton, Catherine C	"	3,475 24
Motley, Ann E	"	2,202 00
Mott, William, trustee for John Brown	"	1,444 44
Myers, Catherine	"	547 80
Nevel, Daniel	"	1,988 83
Nicholas, John	"	344 25
Norton, Patrick	"	1,147 86
Nugent, Mary	"	228 47

Name.	Residence.	Amount.
O'Brien, Catherine	Cambridgeport	167 35
O'Brien, Dennis	Boston	104 40
O'Brien, Ellen	"	365 06
O'Brien, Julia	"	161 98
O'Neil, Catherine		285 08
Otis, Mary (treasurer), trustee for Philena F. Ryan	Boston	55 09
Owens, John	"	455 59
Pealthrop, Hannah	"	186 67
Peterson, Cæsar	"	2,111 30
Peterson, Charles	"	1,875 96
Pine, John	"	159 79
Pinket, Samuel	"	1,594 42
Redwood, Susannah	"	160 49
Reiley, Catherine	Melrose	56 40
Reordan, Hanna	Boston	722 94
Ritchie, Jane T.	"	436 27
Roby, Ann	"	624 47
Romero, Leonard E.	"	61 68
Rooney, Mary	"	65 66
Ryan, Ann	"	1,060 66
Schuyler, Elizabeth	"	62 61
Searle, Mary	"	126 75
Smith, Peter R.	"	1,256 73
Spencer, Theresa	"	35 88
Square, Antio	"	1,256 83
Staples, Haskett	"	1,389 33
Sullivan, Catherine	"	28 51
Sullivan, Daniel	"	2,724 54
Van Gelder, Henry	"	399 31
Walker, William	"	330 79
Warren, William	"	2,260 57
Welch, Mary	"	2,095 38
Whalan (or Whelan), John	"	1,227 92
Wheelwright, Joseph H.	Chelsea	380 37
Williams, Catherine	Boston	3,617 45
Williams, Isabella	"	88 89
27		
Williams, John	Boston	2,831 88
Williamson, John	"	4,090 30
Wood, Maria	"	692 64
Allette, Anna E.	"	24 00
Barrett, Thomas P.	"	1 00
Bean, Perkins	"	2 00
Bennett, Sarah C.	"	1 00
Bigelow, Timothy	"	3 00
Billings, Eliza A., trustee	"	1 00
Black, Charles E.	"	1 00
Bowen, Harvey, guardian William Dalton	"	19 66

Name.	Residence.	Amount.
Bradford, Mary E.	Cambridgeport	1 00
Brooks, John G.	Boston	1 00
Callaghan, Jeremiah J.	"	1 50
Campbell, Rosa	"	1 00
Chamberlain, Augustus F.	"	1 00
Connors, Catherine	"	18 37
Crawley, Benjamin	"	1 00
Curtis, Joseph H.	"	2 00
Cushing, Tamson H.	"	1 00
Daniels, Frank J., trustee for Eva M. Daniels	Dedham	4 64
Davis, Maria	Boston	1 00
Day, Harriet S.	"	1 00
de Sandrans Victorine Co.	"	2 18
Dunbar, George F.	"	1 00
Eaton, Susan, trustee for Waldo Eaton	Cambridge	16 85
Elwell, Mary L.	Boston	1 55
Folsom, Catherine, trustee for Sarah Thayer	"	1 00
Fredericks, Harriet	"	3 74
Fuller, S. Eugene	Needham	1 00
Garland, Nathaniel	Chelsea	1 00
Gay, Ware B.	Boston	2 00
Goulding, Annie E.	"	1 00
Griffin, Mary	"	1 00
Hamilton, Esther J.	"	17 33
Heard, Richard	Chelsea	1 52
Hurley, James	Boston	2 00
Johnson, Olof, trustee for John A. Johnson, Jr.	Gloucester—East Cambridge	14 51
Kenney, Anna B.	Chelsea	1 00
King, Charles	Boston	1 00
Logan, Mary S.	Lynn	1 00
Lungburg, Hedwig	Boston	20 74
McCarthy, Julia	"	19 19
28		
McCarty, Ellen	Boston	1 00
McDermott, Thomas J.	"	1 12
McDonald, Joseph H.	"	2 00
McDonough, Mary, trustee for Ann McDonough	"	20 27
McIntire, Patrick	"	2 60
McLaughlin, Annie, trustee for Willie Carroll	"	2 00
McLaughlin, Catherine	"	1 75
McMahon, James, executor of Mary Donovan	"	16 68
Moore, John F.	"	1 00

Name.	Residence.	Amount.
Morrison, Katie	Boston	2 00
Muliken, Rebecca H	"	2 00
Murphy, Catherine	"	24 79
Philbrick, John C	"	1 34
Potter, Thomas	"	4 00
Putnam, Mary	"	2 00
Reichert, Elizabeth	East Cambridge	24 79
Ross, Jessie G	Boston	1 00
Ryan, Daniel F	"	2 15
Schultz, Adeline A	"	1 97
Scott, Isabella	"	50
Shelton, John J	"	2 00
Shepard, Adams	"	1 00
Smith, Benjamin H	Brookline	3 15
Smith, Francis J	Boston	1 00
Smith, George A	Newton Centre	14 57
Smith, Maria	Boston	1 11
Stanton, Margaret	"	1 06
Stevenson, Frances G	"	1 00
Sullivan, Jennie T	"	1 40
Teesdale, John O., trustee for Fannie E. Teesdale	"	2 85
Thayer, William P	"	1 00
Tubbs, Frank H	"	1 08
Turner, Charles	"	1 00
Turner, Ruth	Brookline	1 00
Wallace, Frank, Jr	Shirley	2 00
Welch, Elizabeth T., trustee for John B. Read	Newton Centre	15 53
Welch, Elizabeth T., trustee for William Read	Newton Centre	15 53
Welch, Wilson H	West Newton	1 00

It appearing that public notice has been given according to the order of the court, and objections being made to the granting
29 of the petition, and after hearing it appearing that for more than thirty years previous to the date of this petition no deposit has been made on any of the said accounts: that no part of the principal or interest of any of the said accounts has been withdrawn, and no interest has been added upon any of the pass books, but that said deposits have remained during said period unclaimed; that no claimant for any of said deposits is known; and that the depositors of said amounts cannot be found:

It is ordered that the said Provident Institution for Savings in the Town of Boston pay over and transfer to Arthur B. Chapin, treasurer and receiver general for said commonwealth, the amounts deposited as aforesaid, with the increase and proceeds thereof which may have accrued thereon since the time when said deposits were made, with the exception, however, of the deposits standing in the

names of the following-named persons; the same having been paid to the owners thereof:

Thomas P. Barret	$1 00
Harvey Bowen, guardian William Dalton	19 66
George W. & L. N. Cook	154 27
George Dana	178 81
Sarah Fagan, trustee for John H. Adams	152 39
S. Eugene Fuller	1 00
Julia A. Higgins	1,247 15
Margaret Higgins, trustee	719 03
Julia McCarthy	19 19
Catherine McLaughlin	1 75
Elizabeth Reichert	24 79
Mary Searle	126 75
Jennie T. Sullivan	1 40
Elizabeth T. Welch, trustee for John B. Read	15 53

ROBERT GRANT,
Judge of Probate Court.

Filed May 5, 1908.

30 *Claim of Appeal.*

To the Honorable the Judge of the Probate Court in and for the County of Suffolk:

Repr-sents The Provident Institution for Savings in the Town of Boston in the county of Suffolk, that it is aggrieved by a decree of the probate court held at Boston in said county of Suffolk on the 16th day of July A. D. 1908, whereby said court, upon and after hearing upon a petition brought by Dana Malone, attorney general for this commonwealth, in accordance with the provisions of St. 1907, c. 340, against said The Provident Institution for Savings in the Town of Boston, and filed in said court on the 5th day of May A. D. 1908, ordered, adjudged, and decreed that said The Provident Institution for Savings in the Town of Boston pay over and transfer to Arthur B. Chapin, treasurer and receiver general for the commonwealth, in accordance with the provisions of said St. 1907, c. 340, certain deposits held by said The Provident Institution for Savings in the Town of Boston, and standing in the names of certain persons whose names and the amounts of said deposits are set forth in said petition and decree.

And it hereby gives notice that it claims an appeal from said decree to the Supreme Judicial Court.

Dated this 23rd day of July A. D. 1908.

THE PROVIDENT INSTITUTION FOR SAVINGS IN THE TOWN OF BOSTON,
By JOHN C. GRAY,
WM. ROPES TRASK, *Its Attorneys.*

Filed July 24, 1908.

31 Appeal entered in Supreme Judicial Court on July 30, A. D. 1908.

Statement of the Objections of the Appellant, The Provident Institution for Savings in the Town of Boston, to the Decree of the Probate Court for the County of Suffolk, Entered July 16, 1908.

And now comes said The Provident Institution for Savings in the Town of Boston, and objects to said decree for the reason that chapter 340 of the Acts and Resolves of Massachusetts for the year 1907 *in* null and void as unconstitutional and in contravention of the Fourteenth Amendment of the Constitution of the United States, as depriving persons of their property without due process of law, and also as in contravention of the constitution of this commonwealth; and also is null and void as unconstitutional and in contravention of the Constitution of the United States as impairing the obligation of contracts.

And said The Provident Ins-itution for Savings in the Town of Boston further objects to said decree for the reason that it is a savings-bank corporation, existing and doing business under a special charter created by a statute of the commonwealth of Massachusetts passed in the year eighteen hundred and sixteen, and not subject to the provisions of St. 1830, c. 81, and the acts in amendment thereof and in addition thereto, and that therefore said chapter 240 of the Acts and Resolves of the commonwealth of Massachusetts for the year 1907 is null and void as uncons-itutional, as aforesaid, as regards it and the deposits standing in the names of the various depositors whose names appear in said decree.

32

And said The Provident Institution for Savings in the Town of Boston further objects to said decree for the various facts and reasons set forth in its answer filed in said probate court, to which answer reference is hereby made.

THE PROVIDENT INSTITUTION FOR SAVINGS IN THE TOWN OF BOSTON,
By JOHN C. GRAY,
WM. ROPES TRASK, *Its Attorneys.*

Filed July 30, 1908.

Reservation.

This case came on to be heard before me on appeal from the decree of the probate court, and thereupon I reserve it for the consideration of the full court upon the petition, answer, decree, appeal therefrom and objections thereto, such decree to be entered as law and justice may require.

JOHN W. HAMMOND,
J. S. J. C.

33 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, Nov. 19, 1908.

In the case of Attorney General vs. Provident Institution for Savings pending in the Supreme Judicial Court for the County of Suffolk

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,

Reservation discharged.

By the Court,

C. H. COOPER, *Clerk.*

November 19, 1908.

34 *Agreement.*

In the above-entitled cause it is agreed as follows:—

That the following were by-laws of The Provident Institution for Savings in the Town of Boston at the time when each of said depositors deposited money with it; namely,—

"19. The Trustees may, at any meeting at which twelve at least of them shall be present, make such further regulations or By-Laws, or alterations of those already made, as they may deem necessary; provided that the same may be re-examined and disallowed by the Corporation at their next meeting; and all such Regulations and By-Laws, and alterations, shall be equally binding on all depositors as those by them subscribed.

* * * * * * *

"22. As the officers of this Institution may be unable to identify every depositor transacting business at the office, the Institution will not be responsible for loss sustained where a depositor has not given notice of his book being stolen or lost, if such book be paid in whole, or in part, on presentment."

That all the by-laws set forth in schedule B of the answer of the respondent, The Provident Institution for Savings in the Town of Boston, were by-laws of said institution at the time when each of said depositors *dispostied* money with it.

That in the year 1880 said by-laws were recodified so as to read as follows:—

"7. At each January and July meeting the Trustees shall
35 authorize such dividend, if any, to the depositors as they shall think proper then to be made from the earnings of the Institution; and such dividends, when made, shall be credited to the depositors as provided in the Twenty-first By-Law.

* * * * * * *

"17. Every depositor shall subscribe the By-Laws of this Institution, and shall thereby assent to the same and to all such alterations thereof as shall be duly made.

"18. No fractional part of a dollar shall be received on deposit, nor shall more than one hundred dollars be received from any person on the same day without the special permission of the Treasurer.

* * * * * * *

"20. Each depositor shall receive a book, in which all deposits and payments shall be entered. And every deposit received is to be taken upon the express condition that no persons shall be entitled to any payment without production of the book.

"21. Whenever a semi-annual dividend shall be authorized by the Trustees, the same is to be computed only upon sums of five dollars or more which shall have been standing to the credit of depositors for six months preceding, and, in the like proportion, upon such as have been so standing for three months preceding; and none shall be allowed for portions of a quarter or on fractions of a dollar, or upon any excess over sixteen hundred dollars
36 in one account.

"22. At the end of every third year from the third Wednesday of July, A. D. 1877, after such reservation as the Trustees shall think prudent for guarantee fund and for the safety of the Institution, an extra dividend of the net earnings then remaining undivided shall be made to those depositors whose deposits shall have remained in the Institution for at least one year then next preceding, in proportion to the amount of dividends which may have been declared on their deposits during the three years then next preceding; but no allowance shall be made for any fractional part of a year or of a dollar, nor upon any account of less than five dollars, nor upon any excess over sixteen hundred dollars in one account.

"23. Money to the credit of depositors will be paid to them in person, or upon their written and witnessed orders, if due notice of such orders shall have been given to the Institution, or, in case of death, to their legal representatives: Provided, that no payment is to be made without production of the deposit book and the entry thereon of such payment.

"24. No person shall be entitled to receive any payment without having given thirty days' previous notice to the Treasurer; but the Treasurer may make any payment upon shorter notice, or upon demand, if it shall happen to suit his convenience.

"25. If the amount to the credit of a deceased depositor be less than two hundred dollars, the Board of Investment may,
37 upon receiving satisfactory security, authorize payment to those equitably entitled, without letters of administration.

* * * * * * *

"28. If a deposit book be stolen or lost, the owner must immediately give written notice thereof to the Institution. Without having received such notice, the Institution will not be responsible of any book be paid, in whole or in part, on presentment. In all cases, payment upon presentment of a deposit book shall be a discharge to the Institution for the amount so paid.

"29. The Trustees may, by vote of a majority of the whole Board, at any time divide the whole of the property among the depositors, in proportion to their respective interests therein, upon giving notice thereof twice a week for twelve successive weeks in any two Boston newspapers, and may at any time decline to receive further deposits.

"30. The Corporation, at any annual meeting, or any special meeting called for the purpose, or the Trustees at any meeting at which twelve of them shall be present, may make such further By-Laws, or alteration of those already made, as they shall see fit; and such further By-Laws and alterations shall be equally binding on all depositors as those by them subscribed."

That in the year 1894, by-law 21 as then existing, was amended by adding the following words thereto:—

"unless such excess is authorized by law, and no accumula-
38 tion or total of deposits shall be allowed by any one depositor exceeding ten thousand dollars."

The said recodified or amended by-law- were the by-laws of the defendant, The Provident Institution for Savings, at the time when the plaintiff brought his petition.

No one of said depositors was notified of, or assented to, said recodification or charge in said by-laws.

DANA MALONE, *Attorney General.*
THE PROVIDENT INSTITUTION FOR SAVINGS IN THE TOWN OF BOSTON,
By JOHN C. GRAY,
WM. ROPES TRASK,
Its Attorneys.

Filed November 19, 1908.

Reservation.

This case came on to be heard before me on appeal from the decree of the probate court; and thereupon I reserve it for the consideration of the full court upon the petition, answer, decree, appeal therefrom and objections thereto, and agreement, such decree to be entered as law and justice may require.

WILLIAM CALEB LORING,
J. S. J. C.

November 19, 1908.

39 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, Jan. 11th, 1909.

In the case of Dana Malone, Att'y Gen'l, vs. The Provident Institution for Savings in the Town of Boston, pending in the Supreme Judicial Court for the County of Suffolk

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,

Decree of Probate Court affirmed.

By the court,

C. H. COOPER, *Clerk.*

January 11, 1909.

Brief Statement of the Grounds and Reasons of the Decision.

The St. 1907 c. 340 which is now found in the St. 1908 c. 590 §§ 56, 57 is constitutional.

40 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

ATTORNEY-GENERAL
v.
THE PROVIDENT INSTITUTION FOR SAVINGS IN THE TOWN OF BOSTON.

Decree.

This cause came on to be heard before me, after rescript from the full court, and now, upon consideration thereof, it is ordered, adjudged and decreed that the decree of the Probate Court be affirmed, and that the cause be remanded to the Probate Court for further proceedings.

By the Court:

WALTER F. FREDERICK, *Clerk.*

January 22, 1909.

41 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof, I have hereunto affixed the seal of our said Court.

Witness, Marcus Perrin Knowlton, Esquire, Chief Justice of our said Supreme Judicial Court, at Boston this eighth day of February in the year of our Lord one thousand nine hundred and nine.

[SEAL.] WALTER F. FREDERICK, *Clerk.*

42 COMMONWEALTH OF MASSACHUSETTS:

I, Marcus Perrin Knowlton, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts, do certify that Walter F. Frederick, Esquire, whose signature is affixed to the paper hereto annexed, is Clerk of said Court, holden at Boston, in and for the County of Suffolk, in said Commonwealth, and hath the keeping of all the ancient files, records and proceedings of said Court throughout the Commonwealth, down to the first day of August A. D. 1797, as

well as of the files, records, and proceedings of said Court holden as aforesaid, for said County of Suffolk, subsequent to that time; and is, by law, the proper person to make out and to certify copies of all the records and proceedings of the said Supreme Judicial Court previous to the said first day of August A. D. 1797, as well as of all records and proceedings of the said Court, holden as aforesaid, for the said County of Suffolk, subsequent to that time; and that full faith and credit is and ought to be given to his acts and attestations, done as aforesaid, and that his attestation to the paper hereunto annexed is in due form.

In testimony whereof, I have hereunto set my hand, and caused the seal of said Court to be hereunto affixed, this eighth day of February in the year one thousand nine hundred and nine.

[SEAL.] MARCUS P. KNOWLTON.

43 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

I, Walter F. Frederick, Clerk of the Supreme Judicial Court within and for said County of Suffolk, hereby certify that the Honorable Marcus Perrin Knowlton, by whom the foregoing certificate was made, and who has thereunto subscribed his name, was at the time of making thereof, and still is, Chief Justice of the Supreme Judicial Court of said Commonwealth, duly commissioned and qualified; to all of whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere.

In witness whereof, I have hereto set my hand and affixed the seal of said Court, this eighth day of February in the year of our Lord one thousand nine hundred and nine.

[SEAL.] WALTER F. FREDERICK, *Clerk.*

44 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *January* 30, 1909.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Attorney General vs. Provident Institution for Savings in the Town of Boston decided on the 11th day of January, 1909.

HENRY W. SWIFT,
Reporter of Decisions.

45 KNOWLTON, *C. J.:*

This application to the probate court was brought by the Attorney-General, under the St. 1907, c. 340, which is now found in the St. 1908, c. 590, s. s. 56 and 57. This statute is as follows:

"SECTION ONE. The probate court shall, upon the application of the attorney-general and after public notice, order and decree that all amounts of money heretofore or hereafter deposited with any savings bank or trust company to the credit of depositors who have not made a deposit on said account, or withdrawn any part thereof, or the interest, or on whose pass books the interest has not been added,

which shall have remained unclaimed for more than thirty years after the date of such last deposit, withdrawal of any part of principal or interest, or adding of interest on the pass book, and for which no claimant is known, or the depositor of it cannot be found, shall, with the increase and proceeds thereof, be paid to the treasurer and receiver general, to be held and used by him according to law, subject to be repaid to the person having and establishing a lawful right thereto, with interest at the rate of three per cent. per
46 annum from the time when it was so paid to said treasurer to the time when it is paid over by him to such person."

"SECTION TWO. Any person claiming a right to money deposited with the treasurer and receiver general under the provisions of the preceding section of this act * * * may establish the same by a petition to the superior court, as provided in section one of chapter two hundred and one of the Revised Laws, as amended by section one of chapter three hundred and seventy of the acts of the year 1905."

The question presented by the report is whether the law is constitutional. The objections to it, on the part of the respondent, are that it is in contravention of the constitution of Massachusetts, and particularly of sections ten and twelve of the Declaration of Rights, that it is in contravention of the fourteenth amendment of the Constitution of the United States, in that it deprives persons of their property without due process of law, and that it is in contravention of the same Constitution in that it impairs the obligation of contracts.

Inasmuch as the depositors referred to in the application have not appeared, and no one represents them or any of them before the court, objections to the constitutionality of the statute, founded only on their interests, are not open to this respondent. Hingham v. Quincy Bridge Corporation, 6 Allen, 353-357. Lampasas v. Bell, 180 U. S., 276-284. Hatch v. Reardon, 204 U. S., 152-160. But inasmuch as most of the objections that they might make are founded upon considerations which are applicable to the claims of this respondent, although perhaps from a different point of view, we
47 shall deal with the questions presented without close scrutiny of the respondent's right to raise them.

The principal argument of the respondent has been in support of six propositions, as follows:

"One. The Legislature cannot substitute another person for the person with whom the depositor made his original contract.

Two. The Legislature cannot substitute a right to the whole of a small fund for a proportional share of a deposit in a very large one.

Three. The Legislature cannot turn a *cestui que trust* of the savings bank into a mere creditor of the state.

Four. The Legislature cannot impair the depositor's right to interest.

Five. The Legislature cannot deprive the respondent of the right to retain the deposits until called for by the owners.

Six. The Legislature cannot deprive a bank of its right to do business in accordance with the terms of its charter."

The argument in support of these propositions seems to assume

that the contract between the respondent and each depositor was made to continue for all time, even if the depositor should die, leaving no heirs, so that his property would escheat to the commonwealth under the R. L. c. 140, s. 3, or should absent himself for many years from the commonwealth, leaving no one to represent him or
48 care for his estate, and should abandon his property altogether. On the contrary the charter granted to the Institution for Savings and the contract between the institution and its depositors must be assumed to have been subject to the sovereign power of the commonwealth, through proper proceedings, to take possession of property that escheats to the commonwealth and hold it as its own, and also to take into its care and custody property abandoned by its owner, when he is an absentee from the commonwealth, leaving no one to represent him for many years, and cannot be found. The right of the commonwealth, in its sovereign power, so to take property into its control under such circumtsances, is well established. Nelson v. Blinn, 197 Mass. 279. Cunnius v. Reading School District, 198 U. S., 458. S. C. 206, Penn. St., 469. Deadrock v. County Court, 1 Cold. (Tenn.) 202. The contract between the corporation and each depositor, by an implied condition, was to be subject to termination by the commonwealth whenever conditions should arise that would justify the state in exercising this power to take the property into its care for the benefit of the persons entitled to it, and when the commonwealth, in view of these conditions, should assert this power. There is nothing in the respondent's charter that limits the right of the commonwealth in these particulars. By the act of the Legislature the corporation was authorized to receive deposits of money, and to use and improve them to the best advantage for the persons making the deposits. St. 1816, c. 92. The ownership of property by the depositors, and the right of the commonwealth to deal with property within its jurisdiction, are not affected by the statute.

49 The property is within the Commonwealth and subject to its jurisdiction. The obligation of a savings bank, chartered in Massachusetts, to one of its depositors, is property subject to the jurisdiction of the state, as much as any tangible chattel. Blackstone v. Miller, 188 U. S., 189. Cunnius v. Reading School District, 198 U. S., 458. S. C. 206 Penn St. 469. If the court, under the R. L. c. 144, as amended by the St. 1904, c. 206, had appointed a receiver of the property of any one of these depositors as an absentee from the commonwealth, there is no doubt that he would have been entitled to collect the money from the respondent and hold it, under the doctrine stated in Nelson v. Blinn, ubi supra. Most of the questions raised by the above quoted propositions could be raised as well, in objecting to the constitutionality of the proceedings, if the suit were brought against the savings bank by a receiver appointed under that statute. Such a suit would be founded on the commonwealth's right to take possession of the abandoned property of an absentee. All the conditions necessary to the exercise of this right must exist before action can be taken under the statute now before us. Thirty years must elapse after the last act of the depositor in relation to his

deposit; and the deposit must be one for which no claimant is known, or of which the depositor cannot be found. These facts show, at least prima facie, that there is no owner in charge or care of the property, and seemingly that it has been abandoned. The last
50 known owner is an absentee, within the meaning of the word as used in the decisions above referred to. The length of time that the property has been left, without any action by him in regard to it, furnishes a strong presumption that, willingly or unwillingly, or ignorantly, he has permanently abandoned it. Such facts give the state jurisdiction to take it in charge.

There is nothing unconstitutional in the disposition made of it under the statute. It is to be held and used by the treasurer and receiver general according to law, but all the time in recognition of the rights of the owner, and of the necessity of repaying it to him, with interest, when he establishes his lawful right thereto The commonwealth, under the statute, becomes a kind of trustee for the owner. The security of the owner is ample.

No question has been raised by the respondent in regard to the course of procedure under the statute. The courts can be trusted to apply the statute properly, under the rules of law. Under our statute, probate courts are to make rules requiring notice of proceedings before the courts to be given to parties interested. R. L. c. 162, s. 30. This means proper notice, which, as against a respondent savings bank, would be nothing less than a personal notice. Besides the general requirements of the R. L., this act specially prescribes public notice. This is sufficient. Kentucky Railroad Tax Cases, 115 U. S., 321-334. Beaks v. De Cunha, 126 N. Y. 293. The statute implies that the whole course of procedure will be legal and proper.

Inasmuch as the state has the substantive right to take the
51 property into its charge and terminate the relations between the savings bank and the depositor under the conditions described in the statute, and to hold the property as a trustee for the true owner until he comes and establishes his right, the statute is constitutional.

Decree of probate court affirmed.

52 [Endorsed:] Attorney General vs. Provident Institution for Savings. Certified copy of the opinion of the Supreme Judicial Court.

53 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court. In Probate.

DANA MALONE, Attorney General,
vs.
THE PROVIDENT INSTITUTION FOR SAVINGS IN THE TOWN OF BOSTON.

Petition for Writ of Error.

To the Honorable Marcus P. Knowlton, Chief Justice of the Supreme Judicial Court of Said Commonwealth:

Respectfully represents The Provident Institution for Savings in the Town of Boston, a corporation duly organized under the laws of said Commonwealth, that on or about the twenty-second day of January A. D. Nineteen hundred and nine the Supreme Judicial Court for the Commonwealth of Massachusetts made and entered a final decree against your petitioner in a certain cause, wherein Dana Malone as Attorney General was petitioner, and your petitioner was respondent, as will more fully appear by reference to the record and proceedings in said cause, in which final decree and the proceedings had prior thereto certain errors were committed to the prejudice of your petitioner, all of which will appear more in detail from the assignments of errors which *is* filed with this petition.

The said Supreme Judicial Court is the highest court of record of said Commonwealth of Massachusetts, in which a decision
54 in this cause and matter could be had, and that certain federal questions have been raised by said final decree.

Wherefore your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Judicial Court of the Commonwealth of Massachusetts for the correction of errors so complained of and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to said Supreme Court of the United States.

Dated this twenty-fifth day of January A. D. Nineteen hundred and nine.

THE PROVIDENT INSTITUTION FOR
SAVINGS IN THE TOWN OF BOSTON,
By WM. ROPES TRASK, *Its Solicitor.*

55 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court. In Probate.

DANA MALONE, Attorney-General,
v.
THE PROVIDENT INSTITUTION FOR SAVINGS IN THE TOWN OF BOSTON.

Assignments of Errors.

Now comes said The Provident Institution for Savings in the Town of Boston, the plaintiff in error, and says that in the final decree of the said Supreme Judicial Court for the Commonwealth of Massachusetts, there is manifest error in this, to wit:

1. The Court erred in holding that the Act of the Legislature of the Commonwealth of Massachusetts, Chapter 340 of the Acts and Resolves of the Commonwealth of Massachusetts for the year 1907, now Chapter 590, sections 56 and 57, of the Acts and Resolves of said Commonwealth for the year 1908, was not unconstitutional as in violation of the Constitution of the United States, Art. 1, section 10, as impairing the obligation of contracts.

2. The Court erred in holding that said act was not unconstitutional as in violation of the fourteenth amendment to the Constitution of the United States as depriving persons of their property without due process of law.

3. The Court erred in holding that said act was not unconstitutional as depriving the plaintiff in error, and the various
56 depositors whose names appear in the decree of the Probate Court, as set forth in the record of said cause, of its and their rights under the special Charter granted to it by an Act of the Legislature of Massachusetts in the year 1816, Chapter 19 of the Acts and Resolves for the year 1816.

4. The Court erred in ordering that distribution of the funds in the hands of the plaintiff in error should be made in accordance with the said decree of the Probate Court.

5. The Court erred in holding that such distribution, and the order therefor, does not deprive the plaintiff in error and said depositors of their liberty and property without due process of law.

6. The Court erred in holding that such distribution, and the order therefor, does not deny to the plaintiff in error and said depositors the equal protection of the law.

7. The Court erred in holding that such distribution, and the order therefor, does not deprive the plaintiff in error and said depositors of rights, privileges and immunities secured to it and them by the Constitution of the United States.

8. The Court erred in making said final decree affirming the said decree of the Probate Court, for the various facts and reasons set forth in the answer of the plaintiff in error filed in said Probate Court, to which answer reference is hereby made.

THE PROVIDENT INSTITUTION FOR SAVINGS IN THE TOWN OF BOSTON,
By JOHN C. GRAY,
W. ROPES TRASK, *Its Attorneys.*

57 Supreme Court of the United States.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Dana Malone, Attorney General of the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, on the* twentieth day of February next, pursuant to an Appeal duly obtained from a decree of the† Supreme Judicial Court of the Commonwealth of Massachusetts wherein The Provident Institution for Savings in the Town of Boston is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Marcus P. Knowlton, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts, this 28th day of January, in the year of our Lord one thousand nine hundred and nine.

MARCUS P. KNOWLTON,
Chief Justice of Supreme Judicial Court.

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*Not exceeding 30 days from the day of signing.
†Name of Court in which the Decree is entered.

58 Service of the within citation is acknowledged in behalf of Dana Malone, Attorney General of the Commonwealth of Massachusetts, by

FRED F. FIELD,
Assistant Attorney General.

January 29, 1909.

59 COMMONWEALTH OF MASSACHUSETTS.
Suffolk, ss:

Supreme Judicial Court.

I, Walter F. Frederick, Clerk of the Supreme Judicial Court in and for said County of Suffolk and Commonwealth of Massachusetts, hereby certify that the papers hereunto annexed are an exemplification of the Record in the case of Dana Malone, Attorney General, Petitioner against Provident Institution for Savings in the Town of Boston, Appellant, and attached thereto and transmitted with said Record are attested copies of the opinion of the full court, the application for writ of error and the assignment of errors, and the original citation with acceptance of service endorsed thereon.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at Boston, this eighth day of February in the year of our Lord one thousand nine hundred and nine.

[SEAL.] WALTER F. FREDERICK, *Clerk.*

60 (*Bond on Writ of Error.*)

Know all men by these presents, That we, The Provident Institution for Savings in the Town of Boston, a corporation duly organized under the laws of the Commonwealth of Massachusetts, as principal and Frank C. Brewer of Hingham in the County of Norfolk and Commonwealth aforesaid as surety are held and firmly bound unto Dana Malone, as Attorney General of said Commonwealth in the full and just sum of five hundred (500) dollars to be paid to the said Dana Malone, Attorney General as aforesaid, his successor, or successors his certain Attorney, Executors, Administrators, or Assigns; to which payment well and truly to be made we bind ourselves, our Heirs, Executors, and Administrators, jointly and severally, by these Presents.

Sealed with our seals, and dated the 26th day of January in year of our Lord one thousand eight hundred and nine.

Whereas lately at a sitting of the Supreme Judicial Court for the Commonwealth of Massachusetts in a suit depending in said Court between Dana Malone, Attorney General and The Provident Institution for Savings in the Town of Boston judgment was rendered against the said The Provident Institution for Savings in the Town of Boston and the said The Provident Institution for

61 Savings in the Town of Boston having procured a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Dana Malone citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now the condition of the above obligation is such, that if the said The Provident Institution for Savings in the Town of Boston shall prosecute its said writ of error to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

THE PROVIDENT INSTITUTION
FOR SAVINGS IN THE TOWN
OF BOSTON. [SEAL.]
By HENRY PARKMAN, *Treasurer.*
FRANK C. BREWER. [SEAL.]

Signed, sealed and delivered in presence of
WM. ROPES TRASK.

Approved:
MARCUS P. KNOWLTON,
C. J. S. J. C.

A true Copy.
Attest:
WALTER F. FREDERICK, *Clerk.*

62 [Endorsed:] 12889. Eq. Attorney General v. Prov. Inst. for Sav. Copy of Bond on Writ of Error. Lodged in Clerk's Office Jan. 28, 1909. Att.: Walter F. Frederick, Clerk. Clerk.

Endorsed on cover: File No. 21,513. Massachusetts Supreme Judicial Court. Term No. 151. The Provident Institution for Savings in the Town of Boston, plaintiff in error, vs. Dana Malone, attorney general of the Commonwealth of Massachusetts. Filed February 11th, 1909. File No. 21,513.

Office Supreme Court, U. S.
FILED.
APR 15 1911
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1910. No. 151.

THE PROVIDENT INSTITUTION FOR SAVINGS IN THE TOWN OF BOSTON, PLAINTIFF IN ERROR

vs.

DANA MALONE, ATTORNEY-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE PROVIDENT INSTITUTION FOR SAVINGS IN THE TOWN OF BOSTON, PLAINTIFF IN ERROR.

Supreme Court of the United States

OCTOBER TERM, 1910. No. 151.

THE PROVIDENT INSTITUTION FOR SAVINGS IN THE TOWN OF BOSTON,

Plaintiff in Error

vs.

DANA MALONE, Attorney-General of the Commonwealth of Massachusetts.

BRIEF FOR THE PROVIDENT INSTITUTION FOR SAVINGS IN THE TOWN OF BOSTON, PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an application by the Attorney-General of Massachusetts to the Probate Court for the County of Suffolk for an order that certain moneys deposited with the plaintiff in error, a savings bank (which will be spoken of herein as the Provident Institution), be paid to the Treasurer of the Commonwealth.

The application was made under the Massachusetts Statute 1907, *c.* 340, now embodied in Mass. St. 1908, *c.* 590, §§ 56, 57.

These sections are as follows:—

> "*Section* 56. The probate court shall, upon the application of the attorney-general and after public notice, order and decree that all amounts of money heretofore or hereafter deposited with any savings bank or trust company to the credit of depositors who have not made a deposit on said account or withdrawn any part thereof or the interest, or on whose pass books the interest has not been added, which shall have remained unclaimed for more than thirty years after the date of such last deposit, withdrawal of any part of principal or interest, or adding of interest on the pass book, and for which no claimant is known or the depositor of it cannot be found, shall, with the increase and proceeds thereof, be paid to the treasurer and receiver general, to be held and used by him according to law, subject to be repaid to the person having and establishing a lawful right thereto, with interest at the rate of three per cent. per annum from the time when it was so paid to said treasurer to the time when it is paid over by him to such person.
>
> *Section* 57. Any person claiming a right to money deposited with the treasurer and receiver general under the provisions of either of the two preceding sections, or of section sixteen of chapter one hundred and sixteen of the Revised Laws, and acts in amendment thereof and in addition thereto, may establish the same by a petition to the superior court as provided in section one of chapter two hundred and one of the Revised Laws, as amended by section one of chapter three hundred and seventy of the acts of the year nineteen hundred and five."

The Attorney-General's petition to the Probate Court (Rec., pp. 3–8) alleged that certain sums of money were on deposit in the Provident Institution to the credit of certain persons; that for more than thirty years previous to the date of the petition no deposit had been made on

any of the accounts of these persons; that no part of the principal or interest of any of the accounts had been withdrawn, and no interest had been added upon any of the pass books; that the deposits had remained unclaimed during said period; and that no claimant for any of the deposits was known, and the depositors could not be found.

Public notice of the petition was given by advertisement in newspapers in Boston (Rec., pp. 8–11).

The Provident Institution, in its answer (Rec., p. 12), admitted the allegations of the petition (except as to a few of the accounts, which it had paid), and further alleged that at the time when each and every one of the persons whose names appear in said petition deposited money with it, it issued to each of said persons a pass book, and that each of said persons then and there subscribed to the by-laws of said Provident Institution (a copy of which was annexed, Rec., p. 15) and agreed to be bound thereby, and that the same should be and constitute the contract between each of them and said Institution; and that all of the above-mentioned by-laws were by-laws of the Provident Institution at the time when each of said depositors deposited money with it.

The Provident Institution further answered that the statute on which the petition was brought was void because in contravention of the Fourteenth Amendment of the Constitution of the United States as depriving persons of their property without due process of law, and also because in contravention of the Constitution of the United States as impairing the obligation of contracts, and also because in contravention of the Constitution of Massachusetts.

The Probate Court granted the prayer of the petition, except as to the small number of deposits which had been paid by the Provident Institution to the depositors (Rec., p. 22).

The Provident Institution appealed to the Supreme Judicial Court of Massachusetts.

Certain facts as to the by-laws of the Provident Institution were agreed (Rec., p. 25).

The Supreme Judicial Court affirmed the decree of the Probate Court, holding the statute constitutional. *Attorney-General* v. *Provident Institution*, 201 Mass. 23 (and Rec., pp. 28, 29).

The Provident Institution was incorporated in 1816. A copy of its charter is annexed to the answer (Rec., p. 13). Acts of incorporation are made public statutes by Massachusetts Revised Laws, *c.* 175, § 72.*

The statute authorizing the repeal of charters was first enacted by St. 1830, *c.* 81, being now embodied in Massachusetts Revised Laws, *c.* 109, § 3:—

> "Every act of incorporation passed since the eleventh day of March in the year 1831 shall be subject to amendment, alteration and repeal by the general court."

* R. L., *c.* 175, § 72: "Acts of incorporation shall be held to be public acts and as such may be declared upon and given in evidence."

ARGUMENT.

The Provident Institution has the right to raise the question of the constitutionality of the statute on which this petition was brought, on account of its fiduciary relation both to the depositors in question and to the other depositors. It is bound to resist an unlawful attempt to take from it a deposit with which it has been intrusted.

The position of the Provident Institution towards its depositors is more than that of debtor and creditor. It occupies a fiduciary position.

> *Commonwealth* v. *People's Five Cent Savings Bank*, 5 Allen, 428, 434.
>
> *Dickinson* v. *Leominster Savings Bank*, 152 Mass. 49, 52.

It has received money from a depositor on a promise to pay it to him or his order or to his legal representative. When a demand is made upon it by a person whom it does not believe to be entitled to claim the money, it is surely its duty to resist that demand, and to call upon this Court to protect it and its beneficiary.

Even if the relation is only that of debtor and creditor, it has an equal right. It says to the person demanding payment, "You have no right to demand it."

If it believed that what purported to be an order of the depositor was a forgery, could it not show it?

Suppose the Legislature had directed that all deposits should be paid to the wife or children of the depositor, could it not show that the Legislative Act was unconstitutional?

Could it not show, upon a demand by an assignee of the depositor under a State Bankrupt Act, that the State had no constitutional right to pass a Bankrupt Act?

So here it believes that the statute authorizing payment to the State is unconstitutional, and it has a right to seek the opinion of this Court upon the question.

Whether the Act is unconstitutional because it impairs the obligation of a contract, or because it deprives the depositor of his property without due process of law, or for any other reason, is immaterial. Money is demanded from it by a person whom it believes to have no constitutional right to demand it.

If this statute is unconstitutional, payment to the State Treasurer would be no defence to an action against the savings bank by the absentee or his next of kin.

The Attorney-General referred, in his argument in the State Court, to the cases in which it has been held that a man called upon to pay under a statute cannot object that the statute is void by reason of a provision which is unconstitutional, if such provision has no bearing upon the demand against him, though it may injuriously affect some one else. But here, if this statute is unconstitutional, this very demand in question cannot properly be made.

This statute relates both to savings banks and to trust companies. If the statute was constitutional as to savings banks, the savings banks, under the cases referred to by the Attorney-General, might not be allowed to contend that it was unconstitutional as to trust companies, but here the contention of the Provident Institution is that the statute is unconstitutional as to savings banks.

Further, in this case, the interest on unclaimed deposits beyond a certain amount, belongs, by the agreement between the savings bank and the depositor, not to the depositor, but to the bank for all the depositors (see Rec., p. 16, by-law 13, and p. 26, by-law 21), and this right gives the savings bank the authority and duty to resist the withdrawal of money by a person, withdrawal by whom is in violation of the Constitution.

The principle involved in this case is a clear and simple one, and depends upon the answer to this question: Is the statute an attempt, for the benefit of the State Treasury, to substitute an obligation from the State at one rate of interest for an obligation from a savings bank at another rate of interest; or is its object to constitute a guardian, curator, tutor, conservator, or whatever he may be called, to act on behalf of the depositor?

If it is the former, it is, of course, unconstitutional.

1. The Legislature cannot substitute another person for the person with whom the depositor made his original contract.

It would seem to need no citation of authorities to show that a statute which says that money owed by A to B shall not be owed by A, but shall be owed by C, impairs the obligation of a contract and deprives a man of his property without process of law.

The case of *Bank of Louisville* v. *Board of Trustees*, 83 Ky. 219, is directly in point.

2. The Legislature cannot turn a *cestui que trust* of the savings bank into a mere creditor of the State.

If a change of debtor by statute impairs a contract, and deprives a creditor of his property, *a fortiori* the deprivation of the property right in the security given him by the contract is an impairment of the contract.

Bronson v. *Kinzie*, 1 How. 311.
McCracken v. *Hayward*, 2 How. 608.

The statute cannot be considered as merely substituting a new trustee; even if it were, such substitution would be unconstitutional.

Knapp v. *Railroad Company*, 20 Wall. 117, 123.

That the substituted debtor or trustee is the State can make no difference. That the State cannot be sued makes the case worse.

If the contract is changed, it is immaterial that something just as good is given instead.

> "And can it be seriously contended, that a law, which changes so materially the terms of a contract, does not impair it? In short, does not every alteration of a contract, however unimportant, even though it be manifestly for the interest of the party objecting to it, impair its obligation? If the assent of all the parties to be bound by a contract be of its essence, how is it possible that a new contract, substituted for, or engrafted on another, without such assent, should not violate the old?"
>
> *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 662.

3. The Legislature cannot impair the depositor's right to the interest due under the contract.

The charter of the Provident Institution, St. 1816, *c.* 92, § 3 (Rec., p. 13), provides that a depositor shall have his proportionate part of the income and profit of the deposits. This may be, and in all probability will be, more than the three per cent. which the statute here in question gives him.

A change in the payment of the interest stipulated for in a contract impairs the obligation of the contract, and is therefore in violation of the Constitution of the United States.

Morley v. *Lake Shore R.R. Co.*, 146 U. S. 162, 168.

But it is not only that here the rate of interest is changed, but that while the State, under the statute, is to pay only simple interest, the savings bank pays compound interest.

And here attention must be called to by-law 13 (Rec., p. 16):—

> "That all dividends shall be added to the principal of the depositor, and shall be entitled to dividends as much as the original deposit; provided that such dividends, when added, do not make the principal exceed sixteen hundred dollars, which shall be the maximum amount upon which dividends are to be cast."

By-law 21 (Rec., p. 26) is to the same effect.

If the amount of a deposit at the time it is turned over to the State is over $1,600, the State is to pay three per cent. on this. If the deposit stays in the savings bank, dividends will be paid only on [redacted] $1,600. Therefore, on a deposit now over $1,600, it is *possible*, though not probable, that the depositor might be able to recover more from the State than he could from the savings bank.

But suppose the deposit is less than $1,600,—say, for example, that it is $500. Here, if the deposit is paid to the State Treasurer, the principal of the debt will remain forever $500, and three per cent. a year will be paid on it. If the deposit stays in the savings bank, the principal will increase to $1,600, and on this dividends will always be paid.

Now, of the deposits of absentees, those which are less than $1,600, and are yet large enough to be entitled to interest, are, as appears by the record, many times more in number than those exceeding $1,600, so that as to this vastly greater number the statute is committing a certain, gross, palpable injustice.

4. But, further, this statute violates the constitutional right not only of the depositor, but also of the Provident Institution representing its other depositors.

The Provident Institution, on behalf of its other de-

positors, has a valid interest in these deposits, as the by-laws above cited show.

The bank is entitled to all the profits earned by any deposit of more than $1,600, over and above the interest on that amount. *The bank and the depositor have contracted that this shall be so.* To take the use of this money from the bank is to deprive the bank, and through it the other depositors, of property without due process of law, and impair the obligation of the contract between the bank and each depositor. This deposit is not abandoned property. It is where the depositor put it, under a contract. It is being used, *in accordance with the original contract,* partly for the benefit of the depositor and partly for the benefit of the other depositors.

5. The Legislature cannot deprive the Provident Institution of its right to do business in accordance with the terms of its charter.

The Provident Institution was incorporated before the Statute of 1830, *c.* 81, authorizing the Legislature to amend charters.

Both the Provident Institution and the depositor have a right to make a contract according to the terms of the original charter, and this right cannot constitutionally be impaired.

Planters' Bank v. *Sharp,* 6 How. 301, 326.

It is immaterial whether the Provident Institution has itself a pecuniary interest in the deposits. It represents the whole body of the depositors. It is entitled to at least the protection that was given by the *Dartmouth College Case* to an educational charity.

It is not necessary to enlarge upon these propositions, for they were not denied by the State Court, and we do

not know that they will be disputed by the Attorney-General.

But the State Court said (Opinion, Rec., p. 29) that the statute in question is not a statute substituting a new party to the contract, and otherwise changing it, but is a statute appointing a custodian for the property of an absentee.

If such is the effect of the statute, we cannot contend, and we do not contend, that the statute is unconstitutional.

For, if the effect of a statute is simply to give an absent depositor a curator or guardian, the case of

Cunnius v. *Reading School District*, 198 U. S. 458,

shows that the statute is constitutional.

As observed in that case, it has not been usual in jurisdictions under the Common Law to give absentees curators or guardians; but this has frequently been done in countries where the Civil Law prevails, and there is nothing unconstitutional in a statute with such an object.

If, then, the object of the statute in question is to appoint a curator or guardian for an absentee, we do not dispute its constitutionality.

But we deny, and here is where we join issue with the Attorney-General, that such is the object of the statute.

Of which kind is the statute?

The answer to this question is best brought out by comparing the statute in this case with the statutes which were held constitutional in the case of *Cunnius* v. *Reading School District* and the Massachusetts case of *Nelson* v. *Blinn*, 197 Mass. 279, which is now before this Court on a writ of error. *Blinn* v. *Nelson*, October term 1910, No. 116.

We will take the latter case first.

Nelson v. *Blinn* was this:—

Massachusetts Revised Laws, *c.* 144,* provided that a receiver might be appointed for the property of an absentee; that at the end of fourteen years "all the right, title and interest of said absentee in said property, real or personal, or the proceeds thereof shall be barred and no

* "SECTION 1. If a resident of the commonwealth having property therein has disappeared, absconded or is absent therefrom and has left no agent therein and his whereabouts are unknown; or if such resident, who has a wife or minor child dependent upon him wholly or partly for support, has disappeared without making sufficient provision for such support and his whereabouts are unknown, or if it is known that they are without the commonwealth, a person who would be entitled to administer upon his estate if he were dead, or such wife, or a person in behalf of such wife or minor child, may file a petition, under oath, in the probate court for the county in which any such property is located or found, stating the name, age, occupation and last known residence or address of such absentee, the date and circumstances of his disappearance, and the names and residence of the family of such absentee and of other persons of whom inquiry may be made and containing a schedule of his property, real and personal, so far as known, and its location within the commonwealth, and praying that such property may be taken possession of and a receiver thereof appointed under the provisions of this chapter."

"SECTION 10. The receiver shall be allowed such compensation and such disbursements as the court orders to be paid out of said property or its proceeds. If such absentee appears within fourteen years after the date of the disappearance and absconding as found and recorded by the court, the receiver shall account to him for, deliver and pay over the unexpended balance of said property. If, within said fourteen years, an administrator, executor, assignee in insolvency or trustee in bankruptcy of said absentee is appointed, such receiver shall account for, deliver and pay over to him the unexpended balance of said property. If said absentee does not appear and claim said property within said fourteen years, all the right, title and interest of said absentee in said property, real or personal, or the proceeds thereof shall be barred and no action, suit or petition in any form shall be commenced by said absentee after the expiration of said fourteen years for or on account of said property or its proceeds.

SECTION 11. If, at the expiration of said fourteen years said property has not been accounted for, delivered or paid over under the provisions of the preceding section, the court shall order the distribution of the unexpended balance thereof to the persons to whom, and in the shares and proportions in which, it would have been distributed if said absentee had died intestate on the day fourteen years after the date of the disappearance or absconding as found and recorded by the court."

action, suit or petition in any form shall be commenced by said absentee," for said property, and that the property should be distributed to those persons who would have been entitled to the absentee's property, had he then died intestate.

The Court said that this was, "of course, a statute of limitations," and therefore constitutional.

This seems questionable. A statute of limitation is a statute passed to protect possession, and in the interest of possessors. Such a statute may be said to deprive the owner of his property, but such statutes have been recognized for a thousand years or more as due process of law, and they are, undoubtedly, due process of law. A statute not protecting a possessor, but saying that A shall have the ownership of a thing that belongs to B, is not, it would seem, a true statute of limitation.

But, however that may be, the important thing to notice here is that the statute in *Nelson* v. *Blinn* was supported only on the ground that it was a statute of limitations, and that the statute now before the Court is not, and does not purport to be, a statute of limitations.

In *Cunnius* v. *Reading School District* a statute authorized the register of wills, if satisfied by the proof that the legal presumption of a man's death was made out, to issue letters of administration to the persons who would be entitled to administration if the man were dead; and provided that all acts in pursuance of such administration should be as valid as if the man were really dead; but that the administration should be revoked if the man turned out to be alive, and that any property received on the ground of being widow, next of kin, or heir of the supposed decedent, could be recovered by the latter as if the act had not been passed. And it was also provided that before any distribution was made the distributees should give security to re-

fund, with interest, the amounts received by them, and, if they could not or would not give security, then the property to be invested as directed by the Court, and the interest only paid to such persons.

This statute was held constitutional on the ground that the right to make regulations concerning the estate or property of absentees was a proper governmental attribute.

In the *Cunnius Case* the absentee turned up alive and sued a debtor for the amount of annual payments which it was bound to make her.

The debtor set up the defence of payment to the administrator. This Court held that this defence was good.

All that the Court had to decide, and all that it did decide, was that the appointment of the administrator was good, and that he could collect the money from the debtor. It did not appear what the administrator had done with the money, and therefore there was no occasion to decide, and the Court did not decide, whether the provision that the administrator might pay over the principal with security, and the interest without security, to the next of kin of the absentee, was valid.

The right of the absentee to recover from the next of kin was most carefully preserved by the statute, and the provisions for payment to the next of kin may perhaps be sustained on the ground that there was a change of custody, and not of ownership.

Such a case is strikingly like a well-known class of cases where trustees hold property to pay the income to a woman for life, and on her death to her children, but, if she has no children, to B. The woman has had no children and is long past the age of child-bearing, and has conveyed her life estate to B. The Court will order the transfer of the property to B. If the woman should miraculously have a child, such child could recover the property from B. There is no change in the right of ownership, but only in the

custody of the property. The cases, which are numerous, may be found collected in Gray on Perpetuities (2d ed.), § 215a, *n.* 5.

But, however this may be, there was no doubt in the *Cunnius Case* that the statute was a statute whose object was to appoint a custodian for the estate of an absentee.

Now compare the statute before the Court in this case with the statute which was before it in the *Cunnius Case.*

The statute here directs that money deposited by an absentee with a savings bank or trust company shall be paid to the Treasurer of the State, to be used by him "according to law,"—which must mean "used for the purposes for which the general funds of the State can be lawfully used,"—to be repaid to the person establishing a right thereto, and that any person claiming "a right to money deposited with the Treasurer" may establish his claim by a petition.

The Attorney-General in his argument before the State Court felt the dissimilarity between the statute in this case and the statute in the *Cunnius Case;* and therefore he contended that this statute was, nevertheless, really a statute for the custody of the absentee's estate, with a direction how the custodian should invest the funds in his hands.

This was undoubtedly the most plausible form in which his case could be put.

But is the contention sound?

We insist, as strenuously as we can, that in determining this question the whole scope of the statute must be looked at. It will not do to pick out this or that particular provision, and say that such provision, taken by itself, is not unconstitutional. The statute must be considered as a whole.

We have no right to go outside of the record; and we are

not going out of the record; we have no call to do so. The statute speaks for itself. It bears its purpose and object on its face.

The State wanted the use of money. It found money deposited in savings banks for the benefit of the depositor (and also, as we have shown, for the benefit of the other depositors). It said: "We should like the handling of this money: we will make ourselves the depositary. The money will probably never be claimed; and, if it is, we will pay it back to the depositor or those claiming under him, with simple interest at half the legal rate. Anyhow, we shall have the use of it in the mean time."

It is sometimes a question whether the ostensible reason for a statute is the real reason. But there is no such question here. One must give the State its due. It did not attempt to cover up its tracks. It stated its object plainly.

A statute directing property of an absentee to be delivered to a person to be used for his own purposes is, on its face, not a statute appointing a curator. To say that such a statute is a statute appointing a curator, and authorizing the curator to use the money for himself, is not simply a forced, but a monstrous interpretation. If such is its meaning, it is clearly unconstitutional as depriving a man of his property.

Is the matter bettered or changed by the provision that the money is to be repaid to the person establishing a claim to it? Does that make it a statute appointing a curator and authorizing him to lend the ward's property to himself? Such a statute might perhaps be not unconstitutional, but it would be such a flagrant violation of the fundamental principles which have always governed fiduciary relations that it cannot be supposed to have been the intention of the Legislature.

But that is not all. If this is a statute providing for a curator, it is a statute not authorizing, but *directing* him

to take money from an investment, not on the ground that the investment is insecure,—of that there is no pretence,—but from an investment which is in fact the safest that can be found, and to lend it to himself. That is not all: it is a statute directing the curator to take the money from a safe investment where it is at four per cent. and more, compound interest, and to lend it to himself at three per cent., simple interest.

A statute appointing a curator of an absentee is a statute made in the interest of the absentee. This is a statute not in the interest of the absentee, and not purporting to be made in the interest of the absentee. If it were, it would not be limited to this particular kind of property.

This is the crucial circumstance which conclusively marks the character of the statute.

A statute appointing a curator for an absentee is passed in the interest of the absentee, because his property is in danger of being lost or destroyed. But the picking out of property which is in no danger of loss or destruction, and leaving out all the property which is in such danger, as is done in the case of this statute, shows that the statute is not one for appointing a curator,—not one passed in the interest of the absentee.

A curator really appointed in the interest of the absentee would leave this money where it is: it is the very best investment for small sums, like those of these deposits, which he could find. If a curator should draw money out of a solid savings bank where it was drawing four per cent. or more, at compound interest, not for the reason or on the pretence that the investment was insecure, but in order that he might lend it to himself at three per cent., simple interest, he would not be properly fulfilling his trust.

Compare the state of things which would arise under this statute with that which arises in the case we have referred to, where property is given to A, a woman, for

life, the remainder to her children, and, if she has no children, then to B, and A has no children and has passed the possible age of child-bearing. There we have two legally possible sets of claimants, but the existence of one set of claimants is physically impossible. The Court will, with the consent of A, give the custody of the property to B.

Like that case was the statute in the *Cunnius Case*, where the property of an absentee is delivered to the next of kin. There are two sets of claimants: the absentee, if he is alive; and the next of kin, if he is dead. The custody, and the custody only, is given to one of the claimants. But here the property is given to neither of the claimants, but to a person who is to employ it for his own use.

The language of the statute shows that what it intends is not the payment of a debt to a curator of the creditor's property, but the substitution of one depositary for another, holding under a continuing obligation; for it speaks of money "deposited" with the Treasurer.

The statute does not purport to be a statute of escheat, and would not be such a statute, even if it called itself such. An escheat is a passing to the State when a man dies, and dies without heirs.

Hamilton v. *Brown*, 161 U. S. 256, 267.

Here the statute assumes that the man may be alive, and that, if he is dead, he may have left heirs.

This thought must occur to every one: Does the Constitution require that this state of things continue forever, that this property must be tied up *in sæcula sæculorum?* By no means. The proper, the honest mode of procedure would be to pass a statute that after thirty years' absence, under the other conditions prescribed in the present statute, the savings bank should publish a notice that, unless a claim was presented within six years, the claim of the

absentee against the savings bank would be barred. That would be a real statute of limitations, a proper, a constitutional statute of limitations.

The savings bank is in possession of this property. The law of all civilized nations recognizes that the lawful owner of property is entitled to it. But the law of all civilized nations also recognizes that by lapse of time the claim of the owner against a possessor may be barred. The owner is deprived of his property, but he is deprived by due process of law, by what has been recognized under the Common Law for at least a thousand years, and in other countries as far back as our knowledge extends, as due process. Usucaption, prescription, statutes of limitation, are established for the benefit of a possessor.

This statute is not, and does not profess to be, such a statute.

A few words as to the language of the opinion of the State Court (Rec., pp. 29–32). The Court states the grounds of the argument for the Provident Institution, against the constitutionality of the statute, substantially as they are stated in the present brief, and then goes on to say that such argument seems to assume that the contract between the Provident Institution and the depositor must continue for all time, though the depositor should die without heirs or should absent himself for many years from the Commonwealth. We urge no such argument; we make no such contention.

We admit absolutely that, if the depositor had died without heirs, his claim against the Provident Institution would, on proper proceedings establishing those facts, escheat to the State; and we admit absolutely that a curator may be appointed for an absentee, who by virtue of his authority can withdraw a deposit made by the absentee in a savings bank.

What we say is that this statute is not, and does not

purport to be, a statute of escheat; and that it is not, and does not purport to be, a statute appointing a curator.

The Court then says the contract between the savings bank and the depositor is on the "implied condition" that it may be terminated when circumstances arise which would justify the State in taking the property into its care for the benefit of the persons entitled to it. Whether this right of the State is correctly described as an "implied condition" may be doubtful; but we make no question that the contract may be terminated by a curator acting for the benefit of the persons entitled to the property, nor that the State may be such curator. What we say is that this statute is not a statute for the benefit of the persons entitled to the property; that there was no "implied condition," if that phrase is to be employed, that the property might be taken over by the State to its own use.

The Court say that most of the objections raised by the Provident Savings Bank might as well have been raised in a suit brought by the receiver appointed under Massachusetts Revised Laws, *c.* 144, to hold the property of an absentee. Not at all. The objections to that statute are of a different kind. If that statute had applied only to savings bank deposits, and had provided that the receiver might use the property for his own purposes, subject to an obligation to repay it to the true owner with simple interest at half the legal rate, then the statutes would be analogous.

We wish to repeat that the statute is not to be dealt with in detached phrases. The question is, Is the statute on its face a statute to protect abandoned property of an absentee from being lost or destroyed, or is it a statute for the benefit of the State Treasury?

JOHN C. GRAY,
WILLIAM ROPES TRASK,
ROLAND GRAY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 151.

THE PROVIDENT INSTITUTION FOR SAVINGS IN THE TOWN OF BOSTON, PLAINTIFF IN ERROR,

v.

DANA MALONE, ATTORNEY-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to the Supreme Judicial Court of the Commonwealth of Massachusetts. The plaintiff in error attacks the constitutionality of chapter 340 of the Acts of the year 1907 of the Legislature of Massachusetts, now sections 56 and 57 of chapter 590 of the Acts of the year 1908.

Chapter 340 of the Acts of the year 1907 is entitled "An Act relative to unclaimed deposits in savings banks," and is as follows: —

"SECTION 1. The probate court shall, upon the application of the attorney-general and after public notice, order and decree that all amounts of money heretofore or hereafter deposited with any savings bank or trust company to the credit of depositors who have not made a deposit on said account or withdrawn any part thereof or the interest, or on whose pass books the interest has not been added, which shall have remained unclaimed for more than thirty years after the date of such last deposit, withdrawal of any part of principal or interest, or adding of interest on the pass book, and for which no claimant is known or the depositor of it cannot be found, shall, with the increase and proceeds thereof, be paid to the treasurer and receiver general to be held and used by him according to law, subject to be repaid to the person having and establishing a lawful right thereto,

with interest at the rate of three per cent per annum from the time when it was so paid to said treasurer to the time when it is paid over by him to such person.

SECTION 2. Any person claiming a right to money deposited with the treasurer and receiver general under the provisions of the preceding section of this act, or of section fifty-five of chapter one hundred and thirteen, or of section sixteen of chapter one hundred and sixteen of the Revised Laws, and acts in amendment thereof and in addition thereto, may establish the same by a petition to the superior court as provided in section one of chapter two hundred and one of the Revised Laws, as amended by section one of chapter three hundred and seventy of the acts of the year nineteen hundred and five.

SECTION 3. This act shall take effect upon its passage. [*Approved April 24, 1907.*"

The present proceeding was commenced May 5, 1908. Chapter 340 of the Acts of the year 1907 was embodied in "An Act to codify, revise and amend the laws relative to savings banks and institutions for savings," chapter 590 of the Acts of the year 1908, as sections 56 and 57 thereof, which are as follows: —

"*Unclaimed Deposits to be paid to Treasurer and Receiver General.*

SECTION 56. The probate court shall, upon the application of the attorney-general and after public notice, order and decree that all amounts of money heretofore or hereafter deposited with any savings bank or trust company to the credit of depositors who have not made a deposit on said account or withdrawn any part thereof or the interest, or on whose pass books the interest has not been added, which shall have remained unclaimed for more than thirty years after the date of such last deposit, withdrawal of any part of principal or interest, or adding of interest on the pass book, and for which no claimant is known or the depositor of it cannot be found, shall, with the increase and proceeds thereof, be paid to the treasurer and receiver general, to be held and used by him according to law, subject to be repaid to the person having and establishing a lawful right thereto, with interest at the rate of three per cent per annum from the time when it was so paid to said treasurer to the time when it is paid over by him to such person.

How such Deposits may be reclaimed.

SECTION 57. Any person claiming a right to money deposited with the treasurer and receiver general under the provisions of either of the two preceding sections, or of section sixteen of chapter one hundred and sixteen of the Revised Laws, and acts in amendment thereof and in addition thereto, may establish the same by a petition to the superior court as provided in section one of chapter two hun-

dred and one of the Revised Laws, as amended by section one of chapter three hundred and seventy of the acts of the year nineteen hundred and five."

Chapter 590 of the Acts of the year 1908 contained an express repeal of chapter 340 of the Acts of the year 1907 (§69), a provision that the provisions of the act so far as they were the same as existing laws should be construed as continuations thereof (§70), and a provision that the act, with the exception of certain sections not here material, should take effect upon its passage (§71). The act was approved June 8, 1908.

This proceeding is an application under this statute by the Attorney-General to the Probate Court for the county of Suffolk that said court order and decree that certain amounts of money deposited with the plaintiff in error be paid to the Treasurer and Receiver-General of the Commonwealth. The plaintiff in error is a savings bank incorporated by a special charter granted by the Legislature of Massachusetts in the year 1816 (chapter 19 of the Acts of the year 1816).

Citation issued upon this application, service of which, by delivering a copy thereof to the plaintiff in error, and by publishing the same once in each week for three successive weeks in two newspapers in Boston, the first publication sixty days and the last publication twenty-one days, at least, before the return day named in the citation, was ordered and made as directed.

The Probate Court found —

" that for more than thirty years previous to the date of this petition no deposit has been made on any of the said accounts; that no part of the principal or interest of any of the said accounts has been withdrawn, and no interest has been added upon any of the pass books, but that said deposits have remained during said period unclaimed; that no claimant for any of said deposits is known; and that the depositors of said amounts cannot be found: "

and ordered the plaintiff in error to pay to the Treasurer and Receiver-General of the Commonwealth the amounts deposited, with the increase and proceeds thereof which had accrued thereon since the time when the deposits were made.

From this decree the plaintiff in error appealed to the Supreme Judicial Court of the Commonwealth, which court affirmed the decree of the Probate Court.

The assignments of error raise questions as to whether the statute is unconstitutional as impairing the obligation of contracts, as depriving persons of liberty and property without due process of law, or as denying to persons the equal protection of the laws.

Argument.

I.

The true construction of the statute is that by it the Commonwealth is constituted the representative of the depositors who are within its terms. The Commonwealth succeeds to the rights of such depositors against the savings bank, but holds such rights in trust for the owners. The Commonwealth is in a position analogous to that of an executor or administrator of the estate of a deceased person, or of a receiver or trustee of the estate of a bankrupt, or of a receiver of the estate of an absentee. The statute does not purport to substitute the Commonwealth for the savings bank, nor to affect the rights of the bank in any way except as it authorizes the Commonwealth, acting in behalf of the depositors of the class described, to enforce the obligations of the savings banks to such depositors. This was the construction given to the statute by the Supreme Judicial Court for the Commonwealth of Massachusetts in the present case when it was before that court (Attorney-General *v.* Provident Institution for Savings, 201 Mass. 23), and the decision of that court as to the construction of the statute is conclusive.

Provident Institution for Savings *v.* Massachusetts, 6 Wall. 611, 628, 630.
Morley *v.* Lake Shore & Michigan Southern Ry. Co., 146 U. S. 162, 167.
Sioux City R.R. Co. *v.* Trust Co. of N. A., 173 U. S. 99, 107.
Equitable Life Assurance Co. *v.* Brown, 213 U. S. 25, 43.
Grenada Lumber Co. *v.* Mississippi, 217 U. S. 433, 440.

II.

There are two aspects in which the constitutionality of the statute may be considered: —

1. In its effect upon the depositors or those claiming in their right; and

2. In its effect upon the savings bank, in this case The Provident Institution for Savings in the Town of Boston, the plaintiff in error.

In the first aspect the question is whether the constitutional rights of the depositors are infringed by the statute, by reason of the fact that by it the Commonwealth is constituted the representative of them and is made to succeed to their rights against the savings bank.

In the second aspect the question is whether the constitutional rights of the savings bank are infringed by the statute, by reason of the fact that by it the Commonwealth is constituted the representative of the depositors and is made to succeed to their rights against the savings bank, or by reason of the character of the provisions of the statute authorizing the enforcement by the Commonwealth of those rights.

III.

Objections to the validity of the statute, on the ground that it infringes the constitutional rights of the depositors, are not open in this case. No depositors have appeared, and no one representing them, or any of them, is before the court attacking the validity of the statute. The plaintiff in error cannot attack it, on the ground that it is unconstitutional as to them. "The objection of unconstitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance."

Lampasas *v.* Bell, 180 U. S. 276, 284.

As was said by Mr. Justice Holmes in Hatch *v.* Reardon, 204 U. S. 152, 160, in speaking of State tax laws: —

"Unless the party setting up the unconstitutionality of the State law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because, if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all."

See, also,

Austin *v.* The Aldermen, 7 Wall. 694.
Supervisors *v.* Stanley, 105 U. S. 305.
Clark *v.* Kansas City, 176 U. S. 114, 118.
Tyler *v.* Judges of Court of Land Registration, 179 U. S. 405, 410.
Red River Valley Bank *v.* Craig, 181 U. S. 548, 558.
Turpin *v.* Lemon, 187 U. S. 51, 60.
Chadwick *v.* Kelly, 187 U. S. 540, 546.
Cronin *v.* Adams, 192 U. S. 108.
Cronin *v.* City of Denver, 192 U. S. 115.
Hooker *v.* Burr, 194 U. S. 415, 419.
Smiley *v.* Kansas, 196 U. S. 447, 457.
The Winnebago, 205 U. S. 354, 360.
Lee *v.* New Jersey, 207 U. S. 67, 70.
Interstate Consolidated Railway Co. *v.* Massachusetts, 207 U. S. 79, 86.
Grenada Lumber Co. *v.* Minnesota, 217 U. S. 433, 442.
Citizens National Bank *v.* Kentucky, 217 U. S. 443, 453–4.
Southern Railway Co. *v.* King, 217 U. S. 524, 534.
Engel *v.* O'Malley, 219 U. S. 128.

IV.

Though objections to the validity of the statute, on the ground that it infringes the constitutional rights of the depositors, are not open in this case, the argument in support of the constitutionality of the statute in its effect upon the depositors may properly be stated. See *infra* V.

The statute was passed by the legislature in the exercise of the jurisdiction of the State to take in charge and administer property abandoned or left unclaimed or uncared for within the Commonwealth. Attorney-General *v.* Provident Institution for Savings, *supra*. The Commonwealth steps into the place of the depositor, reduces his property to possession, and through its Treasurer and Receiver-General holds such property "to be repaid to the person having and establishing a lawful right thereto . . ." That the State has jurisdiction to take in charge and administer property abandoned or left unclaimed or uncared for was settled by the decision of Cunnius *v.* Reading School District, 198 U. S. 458.

See, also,

Barton *v.* Kimmerley, 165 Ind. 609.
N. Y. Life Insurance Co. *v.* Chittenden & Eastman, 134 Ia. 613.
Savings Bank of Baltimore *v.* Weeks, 110 Md. 78.
Nelson *v.* Blinn, 197 Mass. 279.
Attorney-General *v.* Provident Institution for Savings, *supra*.
Cunnius *v.* Reading School District, 206 Pa. St. 469.
Deaderick *v.* County Court, 1 Cold. (Tenn.) 202.
Bickford *v.* Stewart, 55 Wash. 278.

The deposits here in question are within the category of abandoned, unclaimed or uncared for property within the Commonwealth which the State may take in charge and administer. They are property subject to the jurisdiction of the State.

Blackstone *v.* Miller, 188 U. S. 189.

They are debts owed by the bank to the depositors.

Reed *v.* Home Savings Bank, 130 Mass. 443, 446.
Lewis *v.* Lynn Institution for Savings, 148 Mass. 235, 245.
Dickinson *v.* Leominster Savings Bank, 152 Mass. 49, 52.

and, therefore, within the jurisdiction of the State under the authority of Cunnius *v.* Reading School District, *supra*. Such deposits may properly be said to be abandoned, unclaimed or uncared for. It is found as to them that for more than thirty years previous to the date of the petition no deposit has been made on any of the accounts; that no part of the principal or interest of any of them

has been withdrawn, and no interest has been added upon any of the pass books, but that the deposits have remained during that period unclaimed. (Record, p. 22.) In other words, more than thirty years have elapsed since the depositors have performed any of the usual acts of ownership. This has been true in spite of the fact that the law required savings banks in 1902 and in 1907 to publish a list, with certain exceptions, of depositors who had neither deposited nor withdrawn money during the twenty years last preceding, and to furnish the Bank Commissioners with such list for publication in their annual report (Revised Laws, c. 113, § 50); and in 1901 and in each third year thereafter to call in the books of depositors for verification, which verification would naturally imply the adding of interest thereon (Revised Laws, c. 113, § 53). [The plaintiff in error was subject to these laws (see Opinion of the Justices, 9 Cush. 604), and it is to be presumed that it has complied with them.] Moreover, it is found that no claimants for any of the deposits are known, and that the depositors cannot be found. (Record, p. 22.) These facts, which by the terms of the statute must appear if the Probate Court is to have jurisdiction to order payment of the deposits to the Treasurer and Receiver-General of the Commonwealth, much more clearly establish that the property in question is abandoned, unclaimed or uncared for than does the absence of the owner for seven or more years from the place of his last domicil within the State, which fact, by the statute sustained by this court in Cunnius *v.* Reading School District, *supra,* gives jurisdiction to administer the estate of such owner. See also Nelson *v.* Blinn, *supra.*

That the statute in question in the case at bar applies only to a limited class of property, i.e., deposits in savings banks and trust companies, does not make it objectionable. The legislature could reasonably find that this species of property was especially liable to be abandoned, unclaimed or uncared for, and that the interests of the depositors and the general interest of society demanded special provisions in regard to it. Savings banks have recognized and distinctive characteristics. "They are what their name indicates, banks of deposit for the accumulation of small savings belonging to the industrious and thrifty." Mr. Justice Matthews in Mercantile Bank *v.* New York, 121 U. S. 138, 161. "They are substantially institutions, under public management, in pursuance of a great and beneficial public policy, organized for the purpose of investing the savings of small depositors, and not as banking institutions in the commercial sense of that phrase." Mr. Justice Matthews in Bank of Redemption *v.* Boston, 125 U. S. 60, 68. See also Opinion of the Justices, *supra,* p. 609. Each deposit is likely, therefore, to be small in amount [see, for example, the deposits in

the present case (Record, pp. 17–22), noting that the amounts stated must include interest for periods of at least thirty years]. The depositors are likely to be persons of small means, in many cases wage-earners who move from place to place as their employment changes. From these facts it could reasonably be inferred that deposits in savings banks are a species of property especially liable to be abandoned, unclaimed or uncared for, and that the depositors are persons who especially require the protection of the law. *Cf.* Engel *v.* O'Malley, *supra,* pp. 137–8. No other property stands in the same position as do savings bank deposits, except perhaps deposits in trust companies, and such deposits are within the terms of the statute. The "classification has a reasonable basis, and is not merely arbitrary selection without real difference between the subjects included and those omitted from the law." Watson *v.* Maryland, 218 U. S. 173, 178, quoted in Griffith *v.* Connecticut, 218 U. S. 563, 569. This court cannot say that there is "no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched." Missouri, Kansas & Texas Ry. Co. *v.* May, 194 U. S. 267, 269, quoted in Williams *v.* Arkansas, 217 U. S. 79, 90, and in Watson *v.* Maryland, *supra,* p. 179. For a further discussion of this subject see *infra* XI.

There is no difference between the statute here in question and that sustained in Cunnius *v.* Reading School District, *supra,* in respect to the method of taking in charge and administering the property, which affects the validity of the former act. That the application for the order or decree is made by an officer of the Commonwealth, the Attorney-General, rather than, as in the Cunnius case, by a person who would be entitled to administer the estate of an absentee if he was in fact dead, is not detrimental to the rights of the depositors. In fact, some such provision is necessary. The long period of time which has elapsed without any claim having been made by any person in behalf of a depositor, and without any person who would be entitled to administer the estate of such depositor, if deceased, having sought appointment as administrator on the ground that such depositor was deceased, or as receiver of the estate of such depositor on the ground that such depositor was an absentee, indicates that if the property is to be taken care of the State must act. So, too, the disposition made of the property is not in violation of the owner's rights. "It is to be held and used by the treasurer and receiver general according to law, but all the time in recognition of the rights of the owner, and of the necessity of repaying it to him, with interest, when he establishes his lawful right thereto. The Commonwealth, under the statute, becomes a kind of trustee for the owner. The security of the owner is ample." Knowlton, C.J., in Attorney-General *v.* Provident Institution for

Savings, *supra,* page 27. The property is certainly as safe in the hands of a responsible officer of the Commonwealth, who has given bond for the proper discharge of his duties and trusts (Revised Laws, c. 6, § 1), as in the hands of the administrator appointed under the statute considered in Cunnius *v.* Reading School District, *supra,* or in the hands of distributees who have given bond to repay if occasion requires, in accordance with the terms of that statute. Finally, there is ample provision for those claiming rights in the property to establish their rights in the courts. (St. 1907, c. 340, § 2; St. 1908, c. 590, § 57; Revised Laws, c. 201, amended by St. 1905, c. 370, § 1.) The provisions of the statute are not necessarily to be construed as authorizing the administration of the estate of the depositor, including distribution thereof. It may properly be construed merely as authorizing payment to the depositor or his assignee, or to the person who shows that he has in a probate, bankruptcy or other proper proceeding established his right to administer such estate, though even payment to the distributees of the estate of a deceased depositor, directly, would not be open to objection on constitutional grounds, provided that their rights were clearly established.

The course of procedure by which, under the statute, the Commonwealth, through its Attorney-General and its Treasurer and Receiver-General, takes possession of the property is not objectionable. The situation is closely analogous to that in the case of the administration of the estate of a decedent, and the course of procedure is properly substantially the same. Upon an application by the Attorney-General to the Probate Court, after public notice, the court orders and decrees payment to the Treasurer and Receiver-General. The jurisdiction is properly conferred upon the Probate Court. A State may fix the jurisdiction of its courts.

Church *v.* Kelsey, 121 U. S. 282.
Rogers *v.* Peck, 199 U. S. 425.

The only constitutional requirements as to procedure are that there be notice and opportunity for hearing. In fact, it may even be doubted whether, as between the Commonwealth and the depositors, notice and opportunity for hearing are constitutional requirements. The proceeding is in its nature preliminary. It is a taking of property into the custody of the State for protection. *Cf.* O'Neil *v.* Glover, 5 Gray, 144, 161–2. *Cf.* also Revised Laws, c. 144, now before this court in Blinn *v.* Nelson, Oct. Term, 1910, No. 116, especially, section 2. As between the Commonwealth and the depositors it concerns possession and not title. By the terms of the statute a deposit is "to be repaid to the person having and establishing a lawful right thereto"; that is, the proceeding by which title is determined comes later. The statute expressly provides for

such proceeding (St. 1907, c. 340, § 2; St. 1908, c. 590, § 57), in which proceeding the claimant will have an opportunity to be heard.

If, however, notice and opportunity for hearing are essential as between the Commonwealth and the depositors upon the preliminary proceeding, ample provision is made therefor. The statute expressly requires "public notice." Moreover, the general provision of law (Revised Laws, c. 162, § 30) that "probate courts shall make rules requiring notice of any hearing, motion or other proceeding before said courts to be given to parties interested . . ." is applicable. As was said by the State court, "this means proper notice . . . The statute implies that the whole course of procedure will be legal and proper." The statutory provisions satisfy the constitutional requirements that notice be a matter of right and not of favor. As construed by the State court, the statute requires adequate notice. This construction is proper and must be accepted here. If the depositors have a constitutional right to notice "the statute is properly to be construed so as to recognize and respect it, and not to deny it. The Constitution and the statute will be construed together as one law."

See,

Kentucky R.R. Tax Cases, 115 U. S. 321, 334.

It is not necessary that the precise form of notice be fixed by the statute. Within the limits fixed by the Constitution the Probate Court may determine the form of notice.

Cf.

Paulsen *v.* Portland, 149 U. S. 30, 40.
Londoner *v.* Denver, 210 U. S. 373, 381.
Home Telephone Co. *v.* Los Angeles, 211 U. S. 265, 279.

Personal notice, however, is not required. From the nature of the case it is impossible, since no claimants are known and the depositors cannot be found. Notice by publication is sufficient. The statute sustained in the Cunnius case contained no provision for notice except by publication. Of this statute the court said (page 47),—

"So far as the notices which it directs to be issued, we think they were reasonable."

The proceedings authorized by the statute in question here, as well as those authorized by the statute considered in that case, are, like proceedings for the administration of the estate of a deceased person, proceedings *in rem.*

See,

Goodrich *v.* Ferris, 214 U. S. 71, 80–1.
Bonnemort *v.* Gill, 167 Mass. 338.

It is of the essence of such proceedings that personal notice may be dispensed with.

Cf.

Pennoyer *v.* Neff, 95 U. S. 714.
American Land Co. *v.* Zeiss, 219 U. S. 47, and cases cited.

Seizure of the *res* or its equivalent is not necessary to justify absence of personal notice if the *res* is within the jurisdiction of the court. It was not required in the Cunnius case, nor is it required in the ordinary proceedings for administration of estates of deceased persons. See, also, Roller *v.* Holly, 176 U. S. 398. In the case at bar, however, the personal notice given to the bank was equivalent to seizure. As was said in Cooper *v.* Reynolds, 10 Wall. 308, 317, —

"While the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. . . . So the writ of garnishment or attachment, or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court."

The notice by publication ordered by the Probate Court in the present case and given in accordance with the order, satisfies the constitutional requirement. The court ordered publication in two newspapers. Publication was made "once in each week, for three successive weeks, . . . the first publication . . . sixty days at least . . . and the last . . . twenty-one days at least before said court." (Record, pp. 11, 22.) In the Cunnius case the provision for notice held sufficient required publication once a week for four successive weeks, the last publication to be two weeks before hearing, and a further publication for two successive weeks subsequent to the hearing giving notice to produce to the court within twelve weeks of the last insertion of the notice satisfactory evidence of the continuance in life of the absentee. If no such evidence was produced, letters of administration were to be granted. That statute requires a longer period of notice than was given in the case at bar. Since, however, it authorizes distribution, there is more reason for requiring long notice. The notice required in the case at bar was, however, reasonable. In Bellingham Bay, etc., Co. *v.* New Whatcom, 172 U. S. 314, 318, Mr. Justice Brewer discussed the question of length of notice required in a tax assessment proceeding. The general principles there laid down are, however, applicable here. He said:

"It may be that the authority of the legislature to prescribe the

length of notice is not absolute and beyond review, but it is certain that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time. The purpose of notice is to secure to the owner the opportunity to protect his property from the lien of the proposed tax or some part thereof. In order to be effectual it should be so full and clear as to disclose to persons of ordinary intelligence in a general way what is proposed. If service is made only by publication, that publication must be of such a character as to create a reasonable presumption that the owner, if present and taking ordinary care of his property, will receive the information of what is proposed and when and where he may be heard."

The notice ordered by the Probate Court in the case at bar satisfies these requirements. Even if it did not and the present case should fall, the statute would not be unconstitutional. The Probate Court would not have complied with the requirement of the statute that adequate notice be given.

The statute does not expressly provide for an opportunity for hearing. Such a provision, however, is necessarily implied from a provision for an order or decree by the Probate Court after public notice. Such was the construction given to it by the State court. That court held that the statute implied "that the whole course of procedure will be legal and proper."

See,

Kentucky R.R. Tax Cases, *supra.*

In the case at bar opportunity for hearing was actually given. The notice published by order of the Probate Court clearly contemplated that depositors should have an opportunity for hearing. They were "cited to appear at a Probate Court to be held" at a given time and place "to show cause" why the Attorney-General's petition should not be granted. (Record, p. 11.) The decree recites that the Probate Court was held according to the terms of the citation. (Record, p. 17.)

Not only is the statute free from the objection that it deprives the depositors of property without due process of law and denies to them the equal protection of the laws, but it is also free from the objection that in its effect upon them it impairs the obligation of contracts. The contractual rights of the depositors against the bank depend upon its by-laws. (Record, pp. 15–7; 25–7.) These rights are to withdraw deposits upon compliance with certain conditions (By-Laws Nos. 14 and 16), to receive certain dividends (By-Law No. 10) and extra dividends (By-Law No. 12) while the deposits remain in the bank, and if the deposits are not withdrawn prior to that time, to share in the division of the property of the

bank upon its dissolution (By-Law No. 20). As already pointed out, the State steps into the place of the depositors and takes control of the property. The right to withdraw the deposits is an incident of the right of the depositors to control the property. The withdrawal of the deposits by the State is an exercise by the lawful representative of the depositors of the contractual rights of such depositors, rather than an impairment of such rights. The depositors have no right to dividends or extra dividends except while the deposits remain in the bank. Withdrawal by a depositor legally terminates his right to dividends; so does withdrawal by his executor, administrator, assignee or other legal representative. The State is his legal representative in respect to an abandoned, unclaimed or uncared for deposit. The same principle applies to the rights of depositors to share in the property of the bank upon dissolution. These rights are legally terminated by the withdrawal of deposits before dissolution. As to a somewhat similar situation see Hamilton *v.* Brown, 161 U. S. 256, 275. For a further discussion of the alleged impairment of the contracts between the plaintiff in error and its depositors see *infra* IX.

V.

The real question in this case is as to the constitutionality of the statute in its effect upon the savings bank (the plaintiff in error). Objections to its constitutionality, founded solely on the interests of the depositors, are not open here (see *supra* III), though it is confidently contended that there are no valid objections to its constitutionality in that aspect. See *supra* IV. It is, however, to be considered whether, if the statute were unconstitutional as to depositors, it would not, for that reason, be unconstitutional as to the savings bank. If, for example, an order should be entered in this case that a deposit be paid to the Treasurer and Receiver-General of the Commonwealth, and later the depositor should appear and sue the savings bank, the decree in this case would not protect the bank if the statute was unconstitutional as to the depositors. Does this give to the bank the right to attack the validity of the statute in its effect upon depositors? It is submitted that it does not.

The possibility above suggested clearly does not bring the plaintiff in error within "the class for whose sake the constitutional protection is given or the class primarily protected" (see Hatch *v.* Reardon, *supra*), as it must if the plaintiff in error is to be allowed to question the validity of the statute in its effect upon depositors. In this aspect of the case the constitutional provisions are not protective of the rights of the bank. So long as the bank does not change its position as to deposits, it is immaterial to it whether the statute is bad or good. If it changes its position or is forced to change its position by paying deposits to the State, its interest thereafter is to sustain

the statute that it may have a defence to possible actions by depositors. Its only interest in the present case, then, arises from its fear that it cannot successfully defend such possible suits. From this point of view the constitutional rights of the bank will not be affected by the statute unless it is unable to defend such suits, and is, therefore, required to pay its deposits twice. This ground is too remote. The statute is presumed to be valid as against persons who raise no objection to it. They (here the depositors) are presumed to have consented to its passage. Hingham & Quincy Bridge Corporation *v.* Norfolk, 6 Allen, 353, 357, citing Wellington, Petitioner, 16 Pick. 87, 97. There is little probability of such suits against the bank, since there is ample provision for recovery from the Commonwealth. If a suit should be brought by a depositor against the bank to recover a deposit which had been paid to the Commonwealth, and the depositor should prevail, the bank stands to lose only a possible difference in interest, together with its costs, for it can undoubtedly recover from the Commonwealth the amount of the deposit which it is required to pay to the depositor. Finally, the mere fact of pecuniary liability or loss because of a statute is not sufficient to entitle a person to question its validity because of its effect on other persons. For example, a person taxed or fined under a statute void *in toto* because unconstitutional in its effect upon other persons has not such an interest as to entitle him to attack the statute as unconstitutional.

See,

Hatch *v.* Reardon, *supra.*
Cronin *v.* Adams, *supra.*
Citizens National Bank *v.* Kentucky, *supra.*

See also,

Lampasas *v.* Bell, *supra;* and generally cases cited *supra* III.

VI.

The plaintiff in error in its attack upon the constitutionality of the statute in its direct effect upon such plaintiff in error claims: —

(1) That the statute impairs the obligation of contracts;

(2) That it deprives the plaintiff in error of property without due process of law; and

(3) That it denies to the plaintiff in error the equal protection of the laws.

VII.

The attack upon the statute upon the ground that it impairs the obligation of contracts is based, —

(1) On the ground that it impairs the obligation of the contract between the Commonwealth and the savings bank (the plaintiff in

error); that is, the contract contained in the charter of the plaintiff in error; and

(2) On the ground that it impairs the obligation of the contracts between the depositors and the savings bank (the plaintiff in error).

VIII.

The statute does not, as contended by the plaintiff in error, impair the obligation of the contract existing between the Commonwealth and the savings bank (the plaintiff in error).

The charter, which embodies this contract, is chapter 92 of the Acts of the Legislature of Massachusetts for the year 1816, which is set out in the record. (Record, pp. 13–4.) It is in very general terms. By its first section persons named are incorporated. By its second the corporation is made capable of receiving deposits of money. The third section enacts, —

"That all deposits of money received by the said Society shall be by the said Society used and improved to the best advantage; and the income and profit thereof shall be by them applied and divided among the persons making the said deposits, their executors or administrators, in just proportion, with such reasonable deductions, and the principal of such deposits may be withdrawn at such times and in such manner, as the said Society shall direct and appoint."

The fourth, fifth and sixth sections provide for the annual meeting, election of members, a common seal, the right to sue and be sued, and the election of officers. The seventh section enacts, —

"That the said Society hereby are, and forever shall be, vested with the power of making By-Laws for the more orderly managing the business of the Corporation; provided the same are not repugnant to the Constitution or Laws of this Commonwealth."

The eighth, and last, section provides for calling the first meeting. This charter was granted before the passage of chapter 81 of the acts of the year 1830, which provides that all acts of incorporation thereafter passed shall be subject to amendment, alteration or repeal at the pleasure of the Legislature. It is, therefore, protected under the rule laid down in the Dartmouth College case (Dartmouth College *v.* Woodward, 4 Wheat. 518). Only by a strained construction of the charter, however, could the statute here in question be held to affect it in such a way as to impair any obligation of contract embodied in it. The statute here in question, as already pointed out (*supra* I), provides merely that in the case of deposits which are within its terms, i.e., deposits which have been abandoned or are left unclaimed or uncared for, the Commonwealth shall be the representative of the depositors in the enforcement of their rights against the bank.

As to the construction of the charter, the State court in the present case said, —

"The argument in support of these propositions (*i.e.*, the contentions of the plaintiff in error) seems to assume that the contract between the respondent and each depositor was made to continue for all time, even if the depositor should die, leaving no heirs, so that his property would escheat to the Commonwealth under the R. L., c. 140, § 3, or should absent himself for many years from the Commonwealth, leaving no one to represent him or care for his estate, and should abandon his property altogether. On the contrary the charter granted to the Institution for Savings and the contract between the institution and its depositors must be assumed to have been subject to the sovereign power of the Commonwealth, through proper proceedings, to take possession of property that escheats to the Commonwealth and hold it as its own, and also to take into its care and custody property abandoned by its owner, when he is an absentee from the Commonwealth, leaving no one to represent him for many years, and cannot be found. The right of the Commonwealth, in its sovereign power, so to take property into its control, under such circumstances, is well established. Nelson *v.* Blinn, 197 Mass. 279. Cunnius *v.* Reading School District, 198 U. S. 458; S. C., 206 Penn. St. 469; Deaderick *v.* County Court, 1 Cold. (Tenn.) 202. The contract between the corporation and each depositor, by an implied condition, was to be subject to termination by the Commonwealth whenever conditions should arise that would justify the State in exercising this power to take the property into its care for the benefit of the persons entitled to it, and when the Commonwealth, in view of these conditions, should assert this power. There is nothing in the respondent's charter that limits the right of the Commonwealth in these particulars. By the act of the Legislature the corporation was authorized to receive deposits of money, and to use and improve them to the best advantage for the persons making the deposits. St. 1816, c. 92. The ownership of property by the depositors, and the right of the Commonwealth to deal with property within its jurisdiction, are not affected by the statute."

Nearly sixty years ago the charter of the plaintiff in error was construed by the then justices of the Supreme Judicial Court of Massachusetts (Shaw, C.J., Dewey, Metcalf, Fletcher, Bigelow and Cushing, JJ.), in answer to a question by the senate of the Commonwealth as to whether the corporation was "subject to the general laws of the Commonwealth relating to savings banks and institutions for savings passed since the granting of the charter . . ." (Opinion of the Justices, 9 Cush. 604), and the opinion contains much that is pertinent to the present inquiry. It is, in part, as follows (pp. 610–2): —

"This act, in effect, only incorporates certain persons as a Savings Bank, in the most general form, without any grant whatever of any

particular or specific powers or privileges, as to the manner of conducting the business.

It accomplished, merely, what is the prime object of an incorporation, that is, 'to bestow the character and properties of individuality upon a collective and changing body of men.'

The act provides, that the corporation shall be capable of receiving deposits, and enacts 'that all deposits of money received by the said society shall be by the said society used and improved to the best advantage.' This last clause might, perhaps, be considered as merely enjoining a duty, and the general law, which prescribes how the investment shall be made, as pointing out the mode in which that duty shall be performed. But at all events, the charter prescribes no mode in which the investment shall be made, but is entirely silent on that subject. There is no grant or provision whatever, in relation to it. If the Provident Institution for Savings in Boston claims the privilege of exemption from legislative action, on one of the legitimate subjects of legislation, it must show that that privilege is granted in their charter. But there is no such express or implied grant. This corporation possesses only such powers as are either expressly or impliedly granted by its charter. There is no express grant in the charter for any power whatever, in relation to the mode of making investments.

Incidental or implied powers, upon just principles of construction, can be made to embrace, at most, only such powers as are essentially necessary to enable the corporation to accomplish the purposes of its creation. Now the provisions of the general laws, prescribing the modes of investment, so far from taking from the corporation any power necessary to accomplish its appropriate business, are directly in aid and support of that power, and adapted and designed as safeguards to the corporation that it might accomplish its appropriate duties, with greater safety and advantage, and the better answer the design of its creation.

It may, perhaps, be said, that the corporation at the time it took its charter, could invest its deposits at its own discretion, without restriction as to the modes of investment. Be it so. But it thus acted, not by virtue of any special power or privilege granted in the charter, in relation to investments, because the charter is silent on that subject, but wholly under and by virtue of the general laws of the Commonwealth. No special power or privilege being given in the charter, as to the mode of conducting its business, the corporation managed all its affairs according to the general laws. It took its charter subject to the general laws, and, of course, subject to such changes as might be rightfully made in such laws. The legislature, surely, did not guarantee to the corporation that there should be no change in the laws, that the whole system of legislation should re-

main as it was in 1816. There were at that time, no general laws in regard to savings banks, as there were no savings banks. But after these institutions were established, and had become numerous and important, it was within the appropriate power of the legislature to make such general laws for their regulation as the public good might require, and there was nothing in the charter of the institution at Boston, to exempt it from the operation of these general laws, and it must, of course, be subject to them in common with all the other similar institutions.

The legislature, by giving to the institution in Boston the privilege of being a corporation, and of managing its proper business, did not relinquish any power of legislating on all proper subjects of legislation.

The institution, at the time it was incorporated, had the right and power, under the general laws, to loan money at six per cent. interest, but there can be no doubt that the legislature could alter the law, so that the institution could take only four or five per cent. interest. The corporation had power under its charter, to hold and dispose of property, but there was nothing in the charter as to the mode, and of course, the property could be held and disposed of only according to the general laws, which the legislature might at any time alter, and the corporation would be bound by the alteration.

The corporation might indorse and negotiate promissory notes, but only according to the general laws, as there was nothing in the charter on the subject, but the legislature might change the whole law on this subject, at any time, or take away altogether, by general laws, the right to indorse and negotiate notes, and these laws would be binding on the corporation. But it cannot be necessary to extend these illustrations. The legislature cannot be deprived of the power it holds for the public good, by any doubtful construction, or remote inference.

The position that the legislature has granted away any of its appropriate powers of legislation, can be supported only by clearly showing such grant. In the present case, there appears to be nothing in the charter of the Provident Institution for Savings in Boston, to exempt it from the provisions of the general laws, passed since the date of the charter, relating to Savings Banks prescribing the modes of investments, and the undersigned are, therefore, of opinion, that that institution is subject to those provisions of those general laws."

The construction given to the charter by the Massachusetts court and by its justices is the only reasonable one. The corporation "took its charter subject to the general laws, and of course, subject to such changes as might be rightfully made in such laws. The legislature, surely, did not guarantee to the corporation that there

should be no change in the laws, that the whole system of legislation should remain as it was in 1816." "The legislature, by giving to the institution in Boston the privilege of being a corporation, and of managing its proper business, did not relinquish any power of legislating on all proper subjects of legislation." "The corporation had power under its charter, to hold and dispose of property, but there was nothing in the charter as to the mode, and of course, the property could be held and disposed of only according to the general laws, which the legislature might at any time alter, and the corporation would be bound by the alteration." In passing the statute here in question the legislature was legislating upon a proper subject of legislation and making a change in the general laws, the power to make which cannot "by any doubtful construction or remote inference" be held to have been contracted away.

The argument for the plaintiff in error that the statute in question conflicts with its charter proves too much. It would scarcely contend that because of this charter the Legislature could not change the law in regard to the administration of the estates of deceased depositors or of minor, incompetent or insolvent depositors. Yet these cases are closely analogous to that of an absentee depositor, and this statute is merely a provision for the administration of property of such depositors. The obligation of contract embodied in the charter is not impaired by this statute any more than it is by the statute (Revised Laws, c. 144) providing for receivers of estates of absentees, if such absentees happen to have deposits with the plaintiff in error. The validity of the latter statute, in another aspect, is now pending before this court. Blinn *v.* Nelson, *supra.*

Upon well recognized principles the statute does not impair any obligation of contract embodied in the charter. These principles are discussed by Mr. Justice Brown in Pearsall *v.* Great Northern Ry., 161 U. S. 646, and the earlier cases epitomized.

In the first place, the charter is to be construed most strongly against the corporation. As was said by Mr. Justice Swayne in Fertilizing Co. *v.* Hyde Park, 97 U. S., 659, 666, quoted by Mr. Justice Brown in Pearsall *v.* Great Northern Ry., *supra:* —

"The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

On such a rule of construction it is clear that no contract on the part of the Commonwealth to permit the plaintiff in error to retain deposits forever, even after they have been abandoned by the owner, can be found in the charter.

In the second place, the only grants of privileges which constitute obligations and are protected by the constitutional provisions from impairment are those which are made for a consideration. In the case of a charter of incorporation they are the grants of those privileges which are "so far necessary to the full enjoyment of the main object of the charter that persons subscribing to the stock might be presumed to take into consideration, and be influenced in their subscriptions, by the fact that the corporation was endowed with those privileges during the continuance of the charter." See Pearsall *v.* Great Northern Ry., *supra*, p. 664. As was said by Mr. Justice McLean in State Bank of Ohio *v.* Knoop, 16 How. 369, quoted by Mr. Justice Brown in Pearsall *v.* Great Northern Ry., *supra*, p. 662:—

"Every valuable privilege given by the charter, and which conduced to an acceptance of it and an organization under it, is a contract which cannot be changed by the legislature where the power to do so is not reserved in the charter. The rate of discount, the duration of the charter, the specific tax agreed to be paid, and other provisions essentially connected with the franchise, and necessary to the business of the bank, cannot, without its consent, become a subject for legislative action."

It is inconceivable that even if a grant of the privilege of retaining the abandoned deposits could be implied from the language of the charter of the plaintiff in error, the privilege so granted "conduced to an acceptance of it and an organization under it." The only advantage resulting from such a privilege would be the advantage resulting from a larger amount of deposits. The bank could not deal with such deposits otherwise than as with active accounts. The difference in the amount of the deposits would be comparatively small, since it is obvious that only a small percentage of deposits are abandoned, though they constitute a species of property especially liable to be abandoned.

In the third place, though "the contract evidenced by the charter cannot be impaired," it does not follow that "the power of the legislature over such charter is wholly taken away, since statutes which operate only to regulate the manner in which the franchises are to be exercised and which do not interfere substantially with the enjoyment of the main object of the grant are not open to the objection of impairing the contract." Mr. Justice Brown in Pearsall *v.* Great Northern Ry., *supra*, p. 665. The most familiar instance of this class of legislation is that enacted under the police power. In its more limited sense the police power deals with matters affecting the public morals, health and safety, and cannot be bargained away. The statute here in question was enacted under the police power in a somewhat broader sense of the term. See Cunnius *v.* Reading

School District, *supra*. It is extremely doubtful if the power to take in charge and administer abandoned, unclaimed or uncared for property within the jurisdiction of the State can be bargained away, but if it can be, there must be a clearer indication of an intention to do so than appears in this charter.

IX.

The other ground upon which the savings bank claims that the statute impairs the obligation of contracts is that it impairs the obligation of the contracts between the depositors and the savings bank. The defendant in error claims that it does not impair the obligation of these contracts.

The contractual rights of the savings bank as against the depositors depend upon the by-laws of the savings bank. (Record, pp. 15–7; 25–7.) These rights are to have the deposits withdrawn only in accordance with certain conditions. These conditions are that money may be received personally, by order in writing of the depositor, or by letter of attorney, but that no person shall be entitled to receive any principal or interest without producing the original book, or without having given thirty days' notice to the treasurer (By-Law No. 14); and that "upon the death of any depositor the money standing in the name and to the credit of such depositor shall be paid to the legal representative, conformably to the laws of the State;" provided, however, that deposits less than one hundred dollars in amount may be paid without letters of administration (By-Law No. 16).

The main question on this branch of the case is whether, by reason of the contract embodied in these by-laws the Commonwealth is prevented from enacting a statute constituting itself the legal representative of depositors whose deposits are abandoned, unclaimed or uncared for. Such is not the true construction of the by-laws.

In construing the by-laws the limitations upon the power to make them must be considered. They were made by reason of the power vested in the plaintiff in error by its charter to make "by-laws for the more orderly managing the business of the corporation; provided the same are not repugnant to the Constitution or Laws of this Commonwealth" (§ 7), as well as by reason of the power conferred upon it to direct and appoint the manner in which the income and profit of deposits shall be "applied and divided among the persons making the said deposits, their executors or administrators," and the principal be withdrawn (§ 3). These grants of power must be construed strictly against the corporation. They are limited to the right to regulate the management of the affairs of the bank. They do not confer upon the bank the right to provide for the administration of the estates of depositors, to effect forfeitures or to restrict

the State in any way in dealing with property within its jurisdiction. As was said by the State court, applying this principle to the statute here in question, —

"The charter granted to the Institutions for Savings and the contract between the institution and its depositors must be assumed to have been subject to the sovereign power of the Commonwealth, through proper proceedings, to take possession of property that escheats to the Commonwealth and hold it as its own, and also to take into its care and custody property abandoned by its owner, when he is an absentee from the Commonwealth, leaving no one to represent him for many years, and cannot be found."

The reference in section 3 of the charter to executors and administrators obviously is not to be taken as authorizing the bank to refuse payment to other legal representatives of depositors. If it was so construed, the bank could defend a suit brought by a guardian, trustee in bankruptcy or receiver of the estate of a depositor. The State, under the statute in question, is the representative of depositors, and its right as such representative to withdraw abandoned, unclaimed or uncared for deposits stands at least as high as do the rights of other legal representatives of depositors. The bank could not, therefore, by its by-laws or otherwise, provide that the State should not take possession of abandoned, unclaimed or uncared for deposits.

Since the bank had no power to make by-laws providing that the State should not take possession of abandoned, unclaimed or uncared for deposits, it follows that it has not made such by-laws. But even if it had the power to make such by-laws, it has not done so. The by-laws must be reasonable construed. They provide only for payment to the depositor or by his order or to his attorney or upon his death, to his legal representative. They do not in terms provide for payment to a representative of a living depositor. It is apparent, however, that the possibility of there being a representative of a living depositor was not considered. Payment to such a representative is not prohibited by the by-laws. As was said by the State court: —

"The contract between the corporation and each depositor, by an implied condition, was to be subject to termination by the Commonwealth whenever conditions should arise that would justify the State in exercising this power to take the property into its care for the benefit of the persons entitled to it, and when the Commonwealth, in view of these conditions, should assert this power."

Any other construction of the by-laws would render it possible for the savings bank to refuse to pay any representative of a depositor whose title to represent such depositor depended upon a statute passed subsequent to the charter.

If the statute here in question is not invalid as impairing an obligation of a contract contained in the by-laws, in that it provides

that the Commonwealth shall be the legal representative of depositors whose deposits are abandoned, unclaimed or uncared for, the further question arises as to whether it is invalid as impairing an obligation of contract in that it permits the Commonwealth to withdraw deposits without giving the thirty days' notice to the treasurer of the bank, required by the by-laws, and without producing the original pass-book.

The statute is not unconstitutional even if it is construed to permit the Commonwealth to withdraw deposits without notice and without producing the original pass-books.

As to notice. The passage of the statute more than thirty days prior to the filing of this petition was sufficient notice to the treasurer of the bank of the intention of the State to withdraw the deposits.

As to production of the pass-books. On a recognized and proper construction of by-laws requiring the production of pass-books, inability to produce, if without fault of the depositor or his representative, will excuse production.

> Wall *v.* Provident Institution for Savings, 6 Allen, 320.
> Hudson *v.* Roxbury Institution for Savings, 176 Mass. 522, 528.
> Wagner *v.* Howard Savings Bank, 52 N. J. Law, 225.
> Warhus *v.* Bowery Savings Bank, 21 N. Y. 543.
> Palmer *v.* Providence Institution for Savings, 14 R. I. 68.

If, as here, the whereabouts of the owners are unknown, it is clearly impossible ordinarily for their representatives to produce the pass-books.

The statute is not to be construed as permitting the Commonwealth to withdraw deposits without notice and without producing the original pass-books if such construction would render it unconstitutional. Obviously, the statute would be practically nugatory if it did not permit the withdrawal of a deposit without the production of the original pass-book. It would, however, be reasonable to construe it as not relieving the Commonwealth from giving the notice required by the by-laws. In the present case, however, it does not appear that the plaintiff in error did not, as a matter of fact, receive notice according to the terms of the by-laws, and it is now too late to raise that point. It was not even before the Supreme Judicial Court of Massachusetts, since this objection was not included in the statement of objections filed in that court.

> Murphy *v.* Walker, 131 Mass. 341, 344.
> Bartlett *v.* Slater, 183 Mass. 152.

See

> Attorney-General *v.* Provident Institution for Savings, *supra.*

So it does not appear that the pass-books were not produced, and, for the reasons applicable to notice, it is now too late to raise that point. It is, of course, a fair assumption that the pass-books were not produced.

X.

The statute does not, as contended by the plaintiff in error, deprive it of its property without due process of law.

The savings bank is not the owner of the deposits which under the statute are to be withdrawn. Its relation to the depositors is substantially that of debtor to creditors. Each depositor has a claim substantially in the nature of a debt against the bank.

Reed *v.* Home Savings Bank, *supra.*
Lewis *v.* Lynn Institution for Savings, *supra.*
Dickinson *v.* Leominster Savings Bank, *supra.*

The collection of a debt by a depositor, that is, the withdrawal of a deposit in accordance with the terms of the contract between him and the savings bank, does not deprive the bank of property. This is equally true of the collection of the debt by a legal representative of the depositor. There can be no doubt that an administrator appointed by a Massachusetts Probate Court of the estate of a deceased depositor, resident or non-resident, could collect from the bank a deposit belonging to such depositor. So far as the bank is concerned there is no valid ground for distinction between such an administrator and the State, in the present case. In respect to abandoned, unclaimed or uncared for deposits the State is the legal representative of the depositors.

The only further question on this branch of the case is as to whether the method by which the State, as such legal representative, enforces the claims of the depositors whom it represents is objectionable. The State may fix the jurisdiction of its courts (Rogers *v.* Peck, *supra*); hence, it may give the Probate Court jurisdiction of these proceedings. The statute provides, in substance, for a proceeding in equity, based on the well recognized principles of avoidance of circuity of action. It is within the power of the State to fix forms of procedure. As was said by Mr. Justice White in Louisville & Nashville R.R. Co. *v.* Schmidt, 177 U. S. 230, 236: —

"It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend. Iowa Central Rail-

way *v.* Iowa, 160 U. S. 389; Wilson *v.* North Carolina, 169 U. S. 586."

The statute in question here was construed by the State court to require personal notice to the savings bank. (See Attorney-General *v.* Provident Institution for Savings, *supra.*) This is sufficient.

Kentucky R.R. Tax Cases, *supra.*
Paulsen *v.* Portland, *supra.*

The provision for an order or decree by the Probate Court, after notice, necessarily implies an opportunity to be heard. See *supra* III.

XI.

The statute does not, as contended by the plaintiff in error, deny to it the equal protection of the laws.

This objection is based on the fact that a distinction is made between savings banks and trust companies and all others.

The constitutional requirement that equal protection of the laws shall not be denied does not forbid classification. Classification must, however, be reasonable and not "merely arbitrary selection without real difference between the subjects included and those omitted from the law." Watson *v.* Maryland, *supra,* quoted in Griffith *v.* Connecticut, *supra.* Those similarly situated must be treated alike.

Kentucky Union Co. *v.* Kentucky, 219 U. S. 140, 161.

Among the later cases on the general topic are, —

Williams *v.* Arkansas, *supra.*
Louisville & Nashville R.R. Co. *v.* Melton, 218 U. S. 36.
Shevlin-Carpenter Co. *v.* Minnesota, 218 U. S. 57.
Mobile, etc., R.R. Co. *v.* Turnipseed, 219 U. S. 35.
Assaria State Bank *v.* Dolley, 219 U. S. 121.
House *v.* Mayes, 219 U. S. 270.
Broadnax *v.* Missouri, 219 U. S. 285.
German Alliance Ins. Co. *v.* Hale, 219 U. S. 307.

The classification made by the statute is reasonable. There is a "real difference between the subjects included and those omitted from the law." Either of the following reasons is sufficient to justify the classification: —

First. — The statute authorizes recovery from all debtors or quasi debtors whose debts can be taken in charge and administered under it. If the statute is valid as against depositors, or if its validity as against them must be presumed, its very existence distinguishes the debts to which it applies, namely, abandoned, unclaimed or uncared for deposits in savings banks and trust companies, from all other debts, and justifies a special method of collecting them. So long as in its application to depositors it applies only to such debts, it can

apply only to such debts in its application to debtors. It includes all debts which can be included.

Second. — In a broader aspect. The statute is an exercise by the State of its right to take in charge and administer abandoned, unclaimed or uncared for property. It applies only to a limited class of such property, namely, deposits in savings banks and trust companies. As already pointed out (see *supra* III), that limited class of property may reasonably be found to especially require the protection of the law. Special provisions for its care and management are therefore justified. Collecting the deposits from the bank is incidental to taking in charge and administering the property abandoned by the depositors, but to insure jurisdiction by something equivalent to seizure, and to avoid circuity of action, the collection may properly be made in the proceeding in which the right to take in charge and administer the property of the depositors is established. The plaintiff in error is not denied the equal protection of the laws unless it can show, as it cannot here, that there is no fair reason for the State to take in charge and administer deposits in savings banks and trust companies which does not apply to other forms of property. That the State may distinguish in its enactments under the police power, between different kinds of business, is well established. A few late cases are, —

Williams *v.* Arkansas, *supra.*
Watson *v.* Maryland, *supra.*
Louisville & Nashville R.R. Co. *v.* Melton, *supra,* p. 53, and cases cited.
Griffith *v.* Connecticut, *supra.*
Engel *v.* O'Malley, *supra.*
Broadnax *v.* Missouri, *supra.*

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